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SUPREME COURT, U. S.
FILED
JUL 14 1969
JOHN F. DAVIS, CLERK

In The Supreme Court Of The United States

October Term, 1969

No. 39

RICHARD HALL AND CHRISTINE HALL,

Appellants

v.

HARRIET BEALS, Clerk and Recorder of El Paso County, and BESS TITUS, Election Supervisor of El Paso County,

Appellees

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT FILED:
January 16, 1969
PROBABLE JURISDICTION NOTED:
May 5, 1969

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RELEVANT DOCKET ENTRIES

October 4, 1968, Summons and Complaint filed.

October 24, 1968, Answer filed.

October 25, 1968, Motion for Permission to File an Amended Complaint filed and heard, Amended Complaint filed, oral argument heard by District Court.

October 30, 1968, Judgment for Defendants entered by District Court.

November 29, 1968, Memorandum Opinion and Order handed down by District Court.

RELEVANT DOCKET ENTRIES (Continued)

December 13, 1968, Notice of Appeal to Supreme Court filed.

January 16, 1969, Jurisdictional Statement filed in Supreme Court.

May 5, 1969, Probable Jurisdiction noted by Supreme Court.

In The Supreme Court Of The United States

October Term, 1968

No. 950

RICHARD HALL AND CHRISTINE HALL,

Appellants

v.

HARRIET BEALS, Clerk and Recorder of El Paso County, and BESS TITUS, Election Supervisor of El Paso County,

Appellees

* * *

COMPLAINT

Plaintiffs, for themselves and all others similarly situated, by their attorneys, QUIGLEY, WILDER, HELWIG & PALERMO, move this Court for an injunction restraining the enforcement and operation of CRS

49-24-1 (1963) on the grounds of the unconstitutionality of the law under the Federal Constitution and for relief in the nature of Mandamus to compel the Defendants to register Plaintiffs as qualified electors to vote in the forthcoming Presidential and Vice-Presidential Election and to allow Plaintiffs to vote in the said election, and in support of this complaint, Plaintiffs allege as follows:

1. Plaintiffs are bona fide residents and domiciliaries of the County of El Paso and the State of Colorado, having moved to the County on June 15, 1968, having taken permanent employment in the City of Colorado Springs, having purchased a home in the City of Colorado Springs, having registered their car in Colorado, having acquired Colorado driver's licenses, and in all other respects, become residents of the State of Colorado.

2. That Plaintiffs wish to vote in the November 5th Presidential and Vice-Presidential Election under the special procedures outlined in CRS 49-24-1 et. seq.

3. That Plaintiffs have requested the Defendants to register them as qualified electors and have been refused such registration because of the six months residency requirement contained in CRS 49-24-1. Plaintiffs in all other respects

save the six months residency requirement of CRS 49-24-1 are qualified to vote for President and Vice-President in that Plaintiffs are American citizens, over the age of twenty one, and under no disability that would prevent them from voting.

4. That Plaintiffs have exhausted their administrative remedies in that they have appealed to the El Paso County Election Officials, the Colorado Secretary of State, and have appealed for an absentee ballot to vote in California, the State from which Plaintiffs came before residing in Colorado, and have been refused relief by all the above.

5. That the six months residency requirement of CRS 49-24-1 violates the Federal Constitution in that it denies Plaintiffs equal protection of the laws, as contained in the Fourteenth Amendment to the Constitution, in that such residency requirement denies to Plaintiffs the right to vote, a right enjoyed by other residents of Colorado who in no respect are different in ability, maturity, association with the national issues, interest in national policies, or any other factor that should control a voter's qualifications to vote for President and Vice-President.

6. That the six-months residency requirement violates Plaintiffs' privileges and immunities as a citizen of the United

States, which are protected by Article IV, Section 2 of the Federal Constitution and Section 1 of the Fourteenth Amendment to the Constitution, in that such residency requirements impinge upon Plaintiffs' right to move among the several States and to change residency during an election year, and result in Plaintiffs losing their National elective franchise for no justifiable reason

7. That the six months residency requirement is arbitrary, capricious, discriminatory and without any logical or legal justification in theory and without any practical validity in practice.

8. That Plaintiffs are without a speedy, adequate, or effective remedy at law in that the Defendant Election Officials refuse to register Plaintiffs to vote in the forthcoming election.

9. That there is a class of voters similarly situated in this County; that the class is too numerous to all appear before this Court; that there is a common question of law and fact among all members of the class, with common relief sought; and that Plaintiffs will fairly and adequately represent all members of the class.

10. That the relief sought from Defendants is not discretionary, in that once the six month residency requirement is removed, registering Plaintiffs to

vote involves no discretion on the part of Defendants, and therefore relief in the nature of Mandamus is appropriate relief.

WHEREFORE, Plaintiffs pray for issuance of an Order or Writ in the nature of Mandamus compelling the Election Officials named as Defendants to register Plaintiffs to vote as a qualified elector for the office of President and Vice-President in the forthcoming National Election, and for an injunction restraining the enforcement and operation of the provisions of CRS 49-24-1, 49-3-1, and Section 1 of Article 7 of the Colorado Constitution, insofar as they establish a residency requirement to vote in the National Election for the office of President and Vice-President on the grounds that such provisions are in violation of the Federal Constitution. Plaintiffs further pray, even should this Court rule against Plaintiffs, that the Defendant Election Officials be directed to register Plaintiffs and allow Plaintiffs to vote in the forthcoming National Election on a conditional basis, so that should either party choose to appeal to the Supreme Court of the United States and such appeal should run past the time of the National Election on November 5, 1968, that the relief sought by Plaintiffs not become moot. Should Plaintiffs win an eventual appeal, the Defendant Election Officials shall be directed to count Plaintiffs' votes as normally cast and valid ballots; should

Plaintiffs lose on final appeal to the Supreme Court of the United States, Defendant Election Officials shall destroy Plaintiffs' ballots as if they had never been cast. This conditional registration is the only way Plaintiffs' sought-for relief can be preserved should an appeal by either party run past the date of the National Election in question.

QUIGLEY, WILDER, HELWIG & PALERMO

By /s/ Richard V. Hall
Attorneys for Plaintiffs
Suite 602, Pikes Peak Building
Colorado Springs, Colorado
471-7700

* * *

ANSWER

COME NOW the Defendants above named by and through Robert L. Russel, District Attorney of the County of El Paso, State of Colorado, and in Answer to the Complaint of the Plaintiffs, admit, deny, and allege as follows:

FIRST DEFENSE

That the Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

That the Complaint is fatally defective in that Plaintiffs have failed to make a jurisdictional allegation as required by Rule 8 (a) (1) of the Federal Rules of Civil Procedure.

THIRD DEFENSE

1. That the Defendants are without sufficient knowledge and information upon which to base a belief as to the truth of the allegations contained in Paragraphs 1, 2, 3, 4, 8 and 9 of Plaintiff's Complaint and therefore denys (sic) the same.

2. That the Defendants deny the allegations contained in Paragraphs 5, 6, 7, and 10 of Plaintiff's Complaint.

3. That the Defendants deny each and every allegation in Plaintiff's Complaint not herein specifically admitted, denied or otherwise put in issue.

WHEREFORE, having fully answered the Plaintiff's Complaint, the Defendants pray for judgment thereon in their favor and against the Plaintiffs, for the costs of this action, and for such other and further relief as the Court may deem proper in the premises.

ROBERT L. RUSSEL
District Attorney
El Paso County, Colorado

By /s/ Bernard R Baker
Bernard R. Baker
Deputy District Attorney
Attorneys for Defendants
Suite 455 Independence Bldg
Colorado Springs, Colorado 80902
Telephone: 636-1671

* * *

MOTION FOR PERMISSION
TO FILE AMENDED COMPLAINT

Plaintiffs, through their attorneys, QUIGLEY, WILDER, HELWIG & PALERMO, move this Court for permission to file an amended complaint in this action, and in support of this motion plaintiffs allege as follows:

1 The second defense in defendants' answer states that plaintiffs' complaint is fatally defective in that plaintiffs have failed to make a jurisdictional allegation as required by Rule 8(a)(1) of the Federal Rules of Civil Procedure.

2 That such failure to make a jurisdictional allegation was an inadvertent omission by the plaintiffs, who felt that they had stated sufficient allegations of jurisdiction in their expressions of claimed unconstitutionality of the

Colorado statute they raised in their original complaint.

3. That the first point raised by plaintiffs in their brief, which has been filed in this action, is an allegation of jurisdiction.

4. That jurisdiction in a suit such as this is proper under 28 U.S.C. 1343.

5. That Rule 15(a) of the Federal Rules of Civil Procedure allow a party to amend his pleading upon leave of Court and states that leave shall be freely given when justice so requires.

WHEREFORE, Plaintiffs move that this Court grant them permission to file an amended complaint in this matter making a sufficient and definite allegation of jurisdiction.

Respectfully submitted,

QUIGLEY, WILDER, HELWIG & PALERMO

By /s/ Richard V. Hall
Attorneys for Plaintiffs
Suite 602, Pikes Peak Building
Colorado Springs, Colorado
471-7700

* * *

AMENDED COMPLAINT

Plaintiffs, for themselves and all others similarly situated, by their attorneys, QUIGLEY, WILDER, HELWIG & PALERMO, move this Court for an injunction restraining the enforcement and operation of CRS 49-24-1 (1963) on the grounds of the unconstitutionality of the law under the Federal Constitution and for relief in the nature of Mandamus to compel the Defendants to register Plaintiffs as qualified electors to vote in the forthcoming Presidential and Vice-Presidential Election and to allow Plaintiffs to vote in the said election, and in support of this complaint, Plaintiffs allege as follows:

1 District Court shall have original jurisdiction of any civil action authorized by law to be commenced by any person to redress the deprivation, under color of any State law or statute, of any right, privilege or immunity secured by the Constitution of the United States providing for equal rights of citizens. 28 U.S.C. 1343(3).

2. Plaintiffs are bona fide residents and domiciliaries of the County of El Paso and the State of Colorado, having moved to the County on June 15, 1968, having taken permanent employment in the City of Colorado Springs, having

purchased a home in the City of Colorado Springs, having registered their car in Colorado, having acquired Colorado driver's licenses, and in all other respects, become residents of the State of Colorado.

3. That Plaintiffs wish to vote in the November 5th Presidential and Vice-Presidential Election under the special procedures outlined in CRS 49-24-1 et. seq.

4. That Plaintiffs have requested the Defendants to register them as qualified electors and have been refused such registration because of the six months residency requirement contained in CRS 49-24-1. Plaintiffs in all other respects save the six months residency requirement of CRS 49-24-1 are qualified to vote for President and Vice-President in that Plaintiffs are American citizens, over the age of twenty one, and under no disability that would prevent them from voting.

5. That Plaintiffs have exhausted their administrative remedies in that they have appealed to the El Paso County Election Officials, the Colorado Secretary of State, and have appealed for an absentee ballot to vote in California, the State from which Plaintiffs came before residing in Colorado, and have been refused relief by all the above.

6. That the six months residency requirement of CRS 49-24-1 violates the Federal Constitution in that it denies Plaintiffs equal protection of the laws, as contained in the Fourteenth Amendment to the Constitution, in that such residency requirement denies to Plaintiffs the right to vote, a right enjoyed by other residents of Colorado who in no respect are different in ability, maturity, association with the national issues, interest in national policies, or any other factor that should control a voter's qualifications to vote for President and Vice-President

7 That the six-months residency requirement violates Plaintiffs' privileges and immunities as a citizen of the United States, which are protected by Article IV, Section 2 of the Federal Constitution and Section 1 of the Fourteenth Amendment to the Constitution, in that such residency requirements impinge upon Plaintiffs' right to move among the several States and to change residency during an election year, and result in Plaintiffs losing their National elective franchise for no justifiable reason

8 That the six months residency requirement is arbitrary, capricious, discriminatory and without any logical or legal justification in theory and without any practical validity in practice.

9 That Plaintiffs are without a

speedy, adequate, or effective remedy at law in that the Defendant Election Officials refuse to register Plaintiffs to vote in the forthcoming election.

10. That there is a class of voters similarly situated in this County; that the class is too numerous to all appear before this Court; that there is a common question of law and fact among all members of the class, with common relief sought; and that Plaintiffs will fairly and adequately represent all members of the class.

11. That the relief sought from Defendants is not discretionary, in that once the six month residency requirement is removed, registering Plaintiffs to vote involves no discretion on the part of Defendants, and therefore relief in the nature of Mandamus is appropriate relief.

WHEREFORE, Plaintiffs pray for issuance of an Order or Writ in the nature of Mandamus compelling the Election Officials named as Defendants to register Plaintiffs to vote as a qualified elector for the office of President and Vice-President in the forthcoming National Election, and for an injunction restraining the enforcement and operation of the provisions of CRS 49-24-1, 49-3-1, and Section 1 of Article 7 of the Colorado Constitution, insofar as they establish a residency requirement to vote in the National Elec-

tion for the office of President and Vice-President on the grounds that such provisions are in violation of the Federal Constitution. Plaintiffs further pray, even should this Court rule against Plaintiffs, that the Defendant Election Officials be directed to register Plaintiffs and allow Plaintiffs to vote in the forthcoming National Election on a conditional basis, so that should either party choose to appeal to the Supreme Court of the United States and such appeal should run past the time of the National Election on November 5, 1968, that the relief sought by Plaintiffs not become moot. Should Plaintiffs win an eventual appeal, the Defendant Election Officials shall be directed to count Plaintiffs' votes as normally cast and valid ballots; should Plaintiffs lose on final appeal to the Supreme Court of the United States, Defendant Election Officials shall destroy Plaintiffs' ballots as if they had never been cast. This conditional registration is the only way Plaintiffs' sought-for relief can be preserved should an appeal by either party run past the date of the National Election in question.

QUIGLEY, WILDER, HELWIG & PALERMO

By /s/ Richard V. Hall
Attorneys for Plaintiffs
Suite 602, Pikes Peak Building
Colorado Springs, Colorado
471-7700

* * *

JUDGMENT FOR DEFENDANTS

THIS CAUSE came on for hearing on October 25, 1968 before the statutory court and the court having fully considered the points is of the opinion that the statute cited is valid and a written opinion will follow, and the court having directed the clerk to enter judgment, it is hereby;

ORDERED AS FOLLOWS:

1) That the judgment is entered in favor of the defendants against the plaintiffs.

2) That the action and complaint be dismissed

DATED at Denver, Colorado, this 30th day of October, 1968

BY ORDER OF THE COURT:

/s/ G Walter Bowman
G. WALTER BOWMAN, Clerk

* * *

MEMORANDUM OPINION AND ORDER

DOYLE, Judge

Plaintiffs, on behalf of themselves

and others similarly situated, seek to enjoin the enforcement, execution and administration of the provisions of Colorado Revised Statutes 1963, § 49-24-1.[1] This prohibits a resident of the State of Colorado from voting in elections for the President and Vice-President of the United States unless such resident has resided within the State of Colorado for a period of "not less than six months next preceding the election at which he offers to vote "[2]

The six months residency requirement for voting for the President and Vice-President of the United States is a recently enacted exception to the basic requirement of one year's residency for

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1. "Eligibility of new resident to vote--- Any citizen of the United States who shall have attained the age of twenty-one years, shall have resided in this state not less than six months next preceding the election at which he offers to vote, in the county or city and county not less than ninety days, and in the precinct not less than fifteen days, and shall have been duly registered as required by the provisions of this article, shall have the right to vote as a new resident for presidential and vice-presidential electors."

2. Id

voting in all other elections in Colorado.[3] The plaintiffs seek to vote only for the President and Vice President of the United States and, therefore, only § 49-24-1 of the Colorado Statutes is challenged in this case.

Plaintiffs are over the age of twenty-one years, citizens of the United States, and have been residents of El Paso County, Colorado, since June 15, 1968.[4]

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3. "Basic qualifications---(1)(a) Every person who has attained the age of twenty-one years, possessing the following qualifications, shall be entitled to register to vote at all general, primary, and special elections:

(b) He shall be a citizen of the United States;

(c) He shall have resided in this state one year immediately preceding the election at which he offers to vote, in the county ninety days, and in the precinct fifteen days. . . . ." 1963 C.R.S. § 49-3-1

4. Plaintiffs have purchased a home at 1617 North Corona Street, Colorado Springs, El Paso County. They have registered their car with the Colorado Motor Vehicle Bureau and have obtained Colorado driver's licenses. Plaintiff, Richard Hall, is permanently employed with the law firm of Quigley, Wilder, Helwig & Palermo, Suite 602 Pikes Peak Building, Colorado Springs, Colorado.

Plaintiffs moved to El Paso County from Contra Costa County, California, where they previously resided and had been registered to vote. In an effort to vote in the election for President and Vice-President of the United States on November 5, 1968, plaintiffs applied for absentee ballots from the State of California, but they were advised by the Contra Costa County election officials that they would not be allowed to vote in California because they were no longer residents of the State of California. On or about August 1, 1968, the plaintiff, Richard Hall, went to the office of the County Clerk and Recorder for El Paso County and requested that he and his wife be allowed to vote there in the election for President and Vice-President of the United States. The registration officials informed the plaintiff that he and his wife would not be allowed to register to vote in the November 5, 1968 election, because of failure to satisfy the residence requirements of the State of Colorado.

Plaintiff then wrote to the Secretary of State of California stating that he would not be allowed to vote in Colorado and requesting that he and his wife be allowed to vote in California for President and Vice-President. On August 28, 1968, plaintiff was informed by letter from the Secretary of State of California that he and his wife would not be allowed to vote in California because they were no longer residents. Plaintiff then wrote to the Secretary of State of Colorado

requesting that he and his wife be allowed to vote for President and Vice-President in Colorado despite the six-month residency requirement. On September 6, 1968, plaintiff was informed by the State Election Office that he and his wife would not be allowed to vote in the State of Colorado because they had not resided in Colorado for the required period of time.

The plaintiffs have exhausted their administrative remedies, and this Court has jurisdiction of the controversy, which arises under the Constitution and laws of the United States. 28 U.S.C. § 1343.

Art. II, Sec. 1 of the Constitution of the United States provides that the President and Vice-President of the United States shall be elected by electors chosen from each State, who shall be appointed "in such Manner as the Legislature thereof may direct." The various methods which have been used in the past for "appointing" electors are discussed in McPherson v. Blacker, 146 U.S. 1, 29-32, 13 S. Ct. 3, 36 L.Ed 869 (1892); for many years all of the States have chosen electors by popular votes.

It has long been settled law that the States have the power to prescribe reasonable and nondiscriminatory qualifications for voting in federal as well as state elections.[5] Therefore, Colorado has the

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5 The right of suffrage is not a privilege and immunity of a citizen of the

unquestioned responsibility and duty to prescribe reasonable and nondiscriminatory qualifications for voting in the election

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5 (continued)

United States, but is a right conferred by the States Minor v Happersett, 21 Wall. 162, 177, 22 L.Ed 627 (1875); Pope v Williams, 193 U.S 621, 632-633, 24 S. Ct 573, 575 (1904) The Supreme Court in Lassiter v Northampton County Board of Elections, 360 U.S. 45, 79 S. Ct 985 (1959), stated:

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, absent of course the discrimination which the Constitution condemns . . . So while the right of suffrage is established and guaranteed by the Constitution it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress acting pursuant to its constitutional powers, has imposed

> We do not suggest that any standards which a State desires to adopt may be required of voters But there is wide scope for exercise of its jurisdiction Residence requirements,

for President and Vice-President of the United States. The Plaintiffs attempt to draw an analogy between the issue they

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5 (continued)

age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters." 360 U.S. at 50-51, 79 S.Ct. at 989-990. (Emphasis added.) (Citations within quote omitted.)

In Gray v. Sanders, 372 U.S. 382, 83 S. Ct. 801 (1963), the Supreme Court made it clear that the states have the power to prescribe qualifications for voting in federal as well as state elections by its statement that

> "[s]tates can within limits specify the qualifications of voters in both state and federal elections; the Constitution indeed makes voters' qualifications rest on state law even in federal elections. Art. I, §2." 372 U.S. at 379, 83 S.Ct. at 808

Although the Supreme Court in Carrington v. Rash, 380 U.S. 91, 85 S.Ct. 775, held unconstitutional a provision of the Texas Constitution prohibiting any member of the Armed Forces of the United States who moves his home to Texas during the course of his

present and the issues involved in the congressional redistricting and legislative reapportionment cases, e g., Reynolds v. Sims, 377 U S 533, 561-562, 84 S Ct 1362 (1964), and Avery v Midland County, 390 U S 474, 88 S Ct 1114 (1968). However, we find, as did the Three-Judge Court in Drueding v Devlin, 234 F. Supp. 721, 725 (D Md 1964), that those cases are not analogous to the issues presented here [6]

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5. (continued)

military duty from ever voting in any election in that State so long as he or she is a member of the Armed Forces, it recognized the long standing principle that "Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot." 380 U.S. at 91, 85 S Ct at 777.

See also Drueding v Devlin, 234 F. Supp 721 (D Md 1964), aff'd per curiam, 380 U S 125, 85 S Ct 807 (1965); Harper v Virginia State Board of Elections, 383 U S 663, 86 S Ct 1079 (1966)

6 The Court in Drueding v Devlin, supra, stated that

> "it may be noted that the Supreme Court declined to intervene in such cases until it was convinced that there was little hope that the several state legislatures would take remedial action." 234 F Supp at 725

Since the State of Colorado has the authority and the responsibility to prescribe qualifications for voting in the election for President and Vice-President of the United States, the only real issue in this case is whether the Colorado Statute which requires residence in the State for six months before an otherwise qualified voter may vote is so unreasonable as to amount to a prohibited discrimination under the Equal Protection Clause of the Fourteenth Amendment.

The leading case on the reasonableness of state residency requirements is Drueding v Devlin, 234 F Supp 721 (D. Md 1964), aff'd per curiam, 380 U S. 125, 85 S Ct 807 (1965). In Drueding, a Three-Judge District Court was faced with the same question presented here. The plaintiffs there, as in the present case, were fully qualified except for satisfying the residency requirement. The statute required one year of residence within the state and six months within the county. The plaintiffs had moved to Maryland from Pennsylvania on June 6, 1964 and had sought to vote in the 1964 presidential election. In every sense, the facts in Drueding are parallel to the facts in this case.

The Court in Drueding noted that there are two purposes in such a statutory residency provision:

1. Identifying the voter and protecting against fraud.

2 Insuring that the voter will in fact become a member of the community, and as such have a common interest in all matters pertaining to its government The fully reasoned opinion by Judge Thomsen expressed the personal opinions of the Judges that the objectives of the statute could probably be attained by a shorter residency requirement, but concluded that the Court was not at liberty to substitute its personal views for those of the legislature in the absence of a showing of unreasonable discrimination. After carefully considering the applicable Supreme Court decisions, the Court concluded that the residency requirements were not so unreasonable as to amount to an irrational discrimination

The Supreme Court of Colorado has stated that the purposes of residency requirements are:

1 To preserve the purity of elections Mauff v People, 52 Colo 62, 123 P 101 (1912)

2 To prevent the control of state affairs by persons who have no pecuniary interest in them Merrill v. Shearston, 73 Colo 230, 214 P. 540 (1923) While the purpose mentioned in Merrill has no application in this case since the plaintiffs want to vote only in the presidential election, the state's interest in preserving the purity of its elections is very much present Some time limit must be set for

determining who is and who is not a resident of Colorado for the purposes of voting, not only to preserve the purity of the election, but also for administrative reasons. In line with the personal opinions of the Judges in Drueding that the objectives of residency requirements could probably be attained in a period less than a year, Colorado has chosen to amend its Constitution and pursuant to that amendment the Colorado legislature has provided a time limit of six months for presidential elections. We are not at liberty to substitute our personal views of what time limit would accomplish the objectives of a residency requirement for the judgment of the Colorado legislature in the absence of a showing of unreasonable discrimination.

The Court in Drueding held that a one year residency requirement was not so unreasonable as to amount to an irrational discrimination, and it was affirmed per curiam by the Supreme Court. The Supreme Court in that case had a clear opportunity to accept the contention that lengthy residency requirements are unreasonable and to set forth guidelines as to what time period would be reasonable. This recent indication of the Supreme Court's viewpoint cannot be ignored. Accordingly, we hold that the Drueding decision is positive authority for dismissal of the complaint and for denial of relief.[7] The

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[7] The Voting Rights Act of 1965 did not overrule Drueding since it is only applicable

Clerk is therefor ordered to dismiss the complaint and to dismiss the cause of action [8]

DATED at Denver, Colorado, this 29th day of November, A D 1968

BY THE COURT:

/s/ Delmas C Hill
DELMAS C HILL, Circuit Judge
Tenth Circuit Court of Appeals

/s/ Ewing T. Kerr
EWING T KERR, Chief Judge
United States District Court
District of Wyoming

/s/ William E Doyle
WILLIAM E DOYLE
United States District Court
District of Colorado

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7 (continued)

to invidious state action, such as discrimination based on race, color or creed There was absolutely no evidence, nor was it even contended, that Colorado's six month residency requirement discriminates against a class of citizens by reason of race, color, creed, or other invidious ground

8 The members of the Court recognize the unfairness and injustice in depriving the plaintiffs of their vote However, we are powerless to remedy this since we must follow the law

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JAN 16 1969
JOHN F. DAVIS, CLERK

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October Term, [redacted] 1969

No. [redacted] 39

RICHARD HALL AND CHRISTINE HALL,

Appellants

v.

HARRIET BEALS, Clerk and Recorder of El Paso County, and BESS TITUS, Election Supervisor of El Paso County,

Appellees

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

STATEMENT AS TO JURISDICTION

RICHARD HALL and CHRISTINE HALL
602 Pikes Peak Building
Colorado Springs, Colorado 80902
Telephone: 471-7700

Appellants, appearing personally pursuant to the provisions of 28 U.S.C. Section 1654.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

STATEMENT AS TO JURISDICTION

The appellants, pursuant to United States Supreme Court Rules 13(2) and 15,

file this statement contending that the Supreme Court of the United States has jurisdiction on direct appeal to review the final decree denying an injunction to appellants in the court below, and that the Court should exercise such jurisdiction in this case.

OPINION BELOW

The District Court below delivered a written opinion on the second day of December, 1968. A copy of this opinion is attached to this jurisdictional statement.

JURISDICTION

The appeal herein is from a final judgment denying appellants an injunction restraining the enforcement of Colorado Revised Statute 49-24-1 (1963). The judgment below was by a three-judge United States District Court for the District of Colorado specially constituted under 28 U.S.C. Sections 2281 and 2284 upon the plaintiffs' application for a permanent injunction to restrain the enforcement, operation or execution of Colorado Revised Statute 49-24-1 (1963) as being repugnant to the "equal protection" and "privileges and immunities" clauses of the Fourteenth Amendment to the Constitution of the United States.

The final judgment appealed from was

originally made in a minute order entered on October 30, 1968, by the District Court for the District of Colorado, and from a memorandum opinion and order handed down on December 2, 1968, by the District Court for the District of Colorado. Notice of appeal was filed in the United States District Court for the District of Colorado on December 13, 1968

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment complained of by the provisions of 28 U.S.C. Sections 1253 and 2101(b). The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. Carrington v. Rash, 380 U.S. 89 (1965); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Williams v. Rhodes, 37 U.S. Law Week 4,001 (October 15, 1968).

The Colorado statute that is involved is Colorado Revised Statutes 49-24-1 (1963), found in Volume 3, Pages 815-816 of the official edition, which reads as follows:

> "ELIGIBILITY OF NEW RESIDENT TO VOTE. - Any citizen of the United States who shall have attained the age of 21 years, shall have resided in this state not less than six months next preceding the election at which he offers to vote, in the county or city and county not less

than ninety days, and in the precinct not less than fifteen days, and shall have been duly registered as required by the provisions of this article shall have the right to vote as a new resident for presidential and vice-presidential electors."

The District Court held that this statute set forth a reasonable residence requirement and was constitutional under the equal protection clause and privileges and immunities clause of the Fourteenth Amendment to the United States Constitution.

QUESTIONS PRESENTED

The principal questions presented in this case are:

1. Whether the six months residence requirement imposed by the State of Colorado before one is allowed to vote for the office of President and Vice President of the United States is a proper and reasonable requirement that can be imposed by the state before allowing one to participate in the national election, or whether such a residence requirement is an unreasonable restriction placed upon a voter and therefore should be struck down under the "equal protection" clause of the Fourteenth Amendment to the Constitution.

2. Whether the residence requirement imposed by the State of Colorado violates the "privileges and immunities" clause of the Fourteenth Amendment to the Constitution of the United States, in that it inhibits and burdens a citizen's right to travel among the several states and to establish residence in any particular state.

closely scrutinized and carefully confined. Reynolds v. Sims, 377 U.S. 533 (1964); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966). A recent Gallup Poll released on December 11, 1968, states that five million people in the United States were denied the right to vote in the last national election because of state imposed residence requirements. Even if the Gallup Poll was fifty per cent inaccurate, the total of two and a half million people being prevented from voting by state imposed residence requirements would still have been a bloc of voters large enough to swing the election had they been allowed to vote. The 1968 national election was so close and remained in doubt to the eleventh hour of balloting, thus giving fresh and direct importance to the rule that any restrictions which exclude that many voters from voting should be carefully and closely scrutinized to see if, in fact, they are reasonable.

a. The "equal protection" argument.

Unless it can be shown that the residence requirement rests on grounds that are relevant to the achievement of a legitimate state purpose and objective, and that the residence requirement is reasonable in light of its purpose, the requirement may violate the concept of equal protection expressed in the Fourteenth Amendment to the United States Constitution. See McLaughlin v. Florida, 379 U.S. 184, 191 (1964); McGowan v. Maryland, 366 U.S. 420, 425 (1961). The one critical factor which

member of the "community," for the community involved is a national one. The voter will be governed by the same President, no matter what state he lives in, and therefore has a stake in choosing who shall be the President.

Second, the normal rationale stating that a voter is familiar with the candidates and issues is irrelevant in a national election for President, for residence in any particular state does not insure that a voter is any more familiar with the candidates for President and the issues involved in the race for President than the voter in any other state or a voter that travels throughout the states.

Third, the statute, as applied, will not prevent double voting, for Colorado does not notify an old state of the fact that someone has voted in Colorado, and therefore a voter could, if he were willing to take the risk of being caught, apply for an absentee ballot and thus be able to vote in two states. The sanction for perjury is the only sanction preventing such double voting, and the residence requirement by itself does not serve such a purpose; even without a residence requirement, the perjury sanction would still apply.

Finally, it is contended that this Court in Williams v. Rhodes, 37 U.S. Law Week 4,301 (October 15, 1968), has recently stated that a state cannot pass a law regulating elections that violates the Fourteenth Amendment requirement of equal protection, and that states cannot rely too heavily on Art. II, Section 1 in the United States Constitution to justify such voting requirements.

Similar arguments and considerations were presented to the Court in the case of Drueding v. Devlin, 234 F. Supp. 721 (DC Maryland, 1964), affirmed per curiam, 380 U.S. 125 (1965), where this Court upheld a lower court's refusal to grant relief to a similar voter in Maryland. However, it is contended that since the Drueding decision, this Court, in Harper v. Virginia Board of Elections, supra, and in Williams v. Rhodes, supra, has expressed consideration and philosophies that would suggest that the Drueding decision should not necessarily remain a fixed determination of this issue. It is contended that there is a growing awareness in this Court, as well as throughout the land, that the right to vote is an important right of every citizen, and should not be limited except for the most legitimate reasons. The closeness of this last election, coupled with the results of the Gallup Poll showing that over five million people were denied the right to vote due to residence requirements, makes it imperative that this Court give fresh consideration to the issues involved here, and not feel constrained by the decision in Drueding v. Devlin, supra.

B. The "privileges and immunities" argument.

In addition, Drueding v. Devlin did not consider the privileges and immunities argument raised in this case. Numerous cases since the Drueding decision have struck down residence requirements involving

the right of new residents to receive sta welfare benefits. See, e.g., Harrell v. Tobriner, 279 F. Supp. 22 (DC, D.C., 1967 Green v. Department of Public Welfare, 27 F. Supp. 173 (DC Pennsylvania, 1967); Thompson v. Shapiro, 270 F. Supp. 331 (DC Connecticut, 1967); Denny v. Health and Services Board, 285 F. Supp. 526 (DC Wisconsin, 1968); Robertson v. Ott, 284 F. Supp. 735 (DC Massachusetts, 1968); Smith v. Reynolds, 277 F. Supp. 65 (DC Pennsylvania, 1967). These cases are now before this Court, 37 U.S. Law Week 3154 (1968), and should they be affirmed by this Court these cases may have a bearing upon the validity of any residence requirement imposed upon the right to vote.

If the right to vote in a national election for the office of President and Vice President is a "privilege" or "national" citizenship, the privileges and immunities clause should bear upon the issues in this case. The right to vote for congressmen and senators in a national election is clearly a right of national citizenship and is protected by the United States Constitution, United States by Katzenbach v. Original Knights of the Klu Klux Klan, 250 F. Supp. 330 (DC Louisiana, 1965); United States v. Classic, 313 U.S. 299 (1941). It has been suggested that the right to vote for presidential electors is equally a privilege of national citizenship, United States v. Buck, 18 F. Supp. 283 (DC Missouri, 1937) affirmed 93 F.2d 385, certiorari denied, 303 U.S. 644 (1937). This Court

whether the requirement is not unduly restrictive under either the equal protection clause or privileges and immunities clause. It is submitted that all these matters are presented by this case, that the right to vote has been increasingly protected and increasingly affirmed in the course of decisions rendered by this Court recently, and it is submitted that this Court may find this case an appropriate one for reversal of the lower court and for an authoritative and elaborate treatment of the issues presented in this case, rather than simply entering a per curiam decision as was done in the Browding v. Doyle case, supra.

Respectfully submitted,

Richard V. Hall

Christine A. Hall

Appellants, appearing personally pursuant to the provisions of 28 U.S.C. Section 1654.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. C-1111

RICHARD HALL and CHRISTINE HALL,

Plaintiffs,

v.

HARRIET BEALS, Clerk and Recorder of El Paso County, and BESS FITUS, Election Supervisor of El Paso County,

Defendants.

Messrs. Quigley, Wilder, Belwig & Palermo, Mr. Richard V. Hall, Attorneys at Law, Suite 602 Pikes Peak Building, Colorado Springs, Colorado, for Plaintiffs and Robert L. Russel, District Attorney, by Bernard R. Baker, Deputy District Attorney, El Paso County, Suite 455 Independence Building, Colorado Springs, Colorado, for Defendants, John P. Moore, Deputy Attorney General, State of Colorado.

MEMORANDUM OPINION AND ORDER

DOYLE, Judge.

Plaintiffs, on behalf of themselves

and others similarly situated, seek to enjoin the enforcement, execution and administration of the provisions of Colorado Revised Statutes 1963, § 49-24-1.[1] This prohibits a resident of the State of Colorado from voting in elections for the President and Vice-President of the United States unless such resident has resided within the State of Colorado for a period of "not less than six months next preceding the election at which he offers to vote."[2]

The six months residency requirement for voting for the President and Vice-President of the United States is a specifically enacted exception to the basic requirement of one year's residency for

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1. "Eligibility of new residents to vote. — Any citizen of the United States who shall have attained the age of twenty-one years, shall have resided in this state not less than six months next preceding the election at which he offers to vote, in the county or city and county not less than ninety days, and in the precinct not less than fifteen days, and shall have been duly registered as required by the provisions of this article, shall have the right to vote as a new resident for president and vice-president." (Emphasis added.)

2. Id.

voting in all other elections in Colorado.[3] The plaintiffs seek to vote only for the President and Vice President of the United States and, therefore, only § 49-24-1 of the Colorado Statutes is challenged in this case.

Plaintiffs are over the age of twenty-one years, citizens of the United States, and have been residents of El Paso County, Colorado, since June 15, 1968.[4]

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3. "Basic qualifications---(1)(a) Every person who has attained the age of twenty-one years, possessing the following qualifications, shall be entitled to register to vote at all general, primary, and special elections:

(b) He shall be a citizen of the United States;

(c) He shall have resided in this state one year immediately preceding the election at which he offers to vote, in the county ninety days, and in the precinct fifteen days . . . ." 1963 C.R.S. § 49-3-1.

4. Plaintiffs have purchased a home at 1617 North Corona Street, Colorado Springs, El Paso County. They have registered their car with the Colorado Motor Vehicle Bureau and have obtained Colorado driver's licenses. Plaintiff, Richard Hall, is permanently employed with the law firm of Quigley, Wilder, Helwig & Palermo, Suite 602 Pikes Peak Building, Colorado Springs, Colorado.

Plaintiffs moved to El Paso County from Contra Costa County, California, where they previously resided and had been registered to vote. In an effort to vote in the election for President and Vice-President of the United States on November 5, 1968, plaintiffs applied for absentee ballots from the State of California, but they were advised by the Contra Costa County election officials that they would not be allowed to vote in California because they were no longer residents of the State of California. On or about August 1, 1968, the plaintiff, Richard Hall, went to the office of the County Clerk and Recorder for El Paso County and requested that he and his wife be allowed to vote there in the election for President and Vice-President of the United States. The registration officials informed the plaintiff that he and his wife would not be allowed to register to vote in the November 5, 1968 election, because of failure to satisfy the residence requirements of the State of Colorado.

Plaintiff then wrote to the Secretary of State of California stating that he would not be allowed to vote in Colorado and requesting that he and his wife be allowed to vote in California for President and Vice-President. On August 28, 1968, plaintiff was informed by letter from the Secretary of State of California that he and his wife would not be allowed to vote in California because they were no longer residents. Plaintiff then wrote to the Secretary of State of Colorado

requesting that he and his wife be allowed to vote for President and Vice-President in Colorado despite the six-month residency requirement. On September 6, 1968, plaintiff was informed by the State Election Office that he and his wife would not be allowed to vote in the State of Colorado because they had not resided in Colorado for the required period of time.

The plaintiffs have exhausted their administrative remedies, and this Court has jurisdiction of the controversy, which arises under the Constitution and laws of the United States. 28 U.S.C. § 1343.

Art. II, Sec. 1 of the Constitution of the United States provides that the President and Vice-President of the United States shall be elected by electors chosen from each State, who shall be appointed "in such Manner as the Legislature thereof may direct." The various methods which have been used in the past for "appointing" electors are discussed in McPherson v. Blacker, 146 U.S. 1, 29-32, 13 S. Ct. 3, 36 L.Ed. 869 (1892); for many years all of the States have chosen electors by popular votes.

It has long been settled law that the States have the power to prescribe reasonable and nondiscriminatory qualifications for voting in federal as well as state elections.[5] Therefore, Colorado has the

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5. The right of suffrage is not a privilege and immunity of a citizen of the

unquestioned responsibility and duty to prescribe reasonable and nondiscriminatory qualifications for voting in the election

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5. (continued)

United States, but is a right conferred by the States. Minor v. Happersett, 21 Wall. 162, 177, 22 L.Ed. 627 (1875); Pope v. Williams, 193 U.S. 621, 632-633, 24 S. Ct. 573, 575 (1904). The Supreme Court in Lassiter v. Northampton County Board of Elections, 360 U.S. 45, 79 S. Ct. 985 (1959), stated:

> "The States have long been held to have broad powers to determine the conditions under which the right of suffrage may be exercised, absent of course the discrimination which the Constitution condemns . . . . So while the right of suffrage is established and guaranteed by the Constitution it is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress acting pursuant to its constitutional powers, has imposed . . . .
>
> . . . .
>
> We do not suggest that any standards which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. Residence requirements,

for President and Vice-President of the United States. The plaintiffs attempt to draw an analogy between the issue they

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5. (continued)

> age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters." 360 U.S. at 50-51, 79 S. Ct. at 989-990. (Emphasis added.) (Citations within quote omitted.)

In Gray v. Sanders, 372 U.S. 382, 83 S. Ct. 801 (1963), the Supreme Court made it clear that the states have the power to prescribe qualifications for voting in federal as well as state elections by its statement that

> "[s]tates can within limits specify the qualifications of voters in both state and federal elections; the Constitution indeed makes voters' qualifications rest on state law even in federal elections. Art. I, §2." 372 U.S. at 379, 83 S. Ct. at 808.

Although the Supreme Court in Carrington v. Rash, 380 U.S. 91, 85 S. Ct. 775, held unconstitutional a provision of the Texas Constitution prohibiting any member of the Armed Forces of the United States who moves his home to Texas during the course of his

present and the issues involved in the congressional redistricting and legislative reapportionment cases, e.g., Reynolds v. Sims, 377 U.S. 533, 561-562, 84 S. Ct. 1362 (1964), and Avery v. Midland County, 390 U.S. 474, 88 S. Ct. 1114 (1968). However, we find, as did the Three-Judge Court in Drueding v. Devlin, 234 F. Supp. 721, 725 (D. Md. 1964), that those cases are not analogous to the issues presented here.[6]

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5. (continued)

military duty from ever voting in any election in that State so long as he or she is a member of the Armed Forces, it recognized the long standing principle that "Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot." 380 U.S. at 91, 85 S. Ct. at 777.

See also Drueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964), aff'd per curiam, 380 U.S. 125, 85 S. Ct. 807 (1965); Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S. Ct. 1079 (1966).

6. The Court in Drueding v. Devlin, supra, stated that

> "it may be noted that the Supreme Court declined to intervene in such cases until it was convinced that there was little hope that the several state legislatures would take remedial action." 234 F. Supp. at 725.

Since the State of Colorado has the authority and the responsibility to prescribe qualifications for voting in the election for President and Vice-President of the United States, the only real issue in this case is whether the Colorado Statute which requires residence in the State for six months before an otherwise qualified voter may vote is so unreasonable as to amount to a prohibited discrimination under the Equal Protection Clause of the Fourteenth Amendment.

The leading case on the reasonableness of state residency requirements is Drueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964), aff'd per curiam, 380 U.S. 125, 85 S. Ct. 807 (1965). In Drueding, a Three-Judge District Court was faced with the same question presented here. The plaintiffs there, as in the present case, were fully qualified except for satisfying the residency requirement. The statute required one year of residence within the state and six months within the county. The plaintiffs had moved to Maryland from Pennsylvania on June 6, 1964 and had sought to vote in the 1964 presidential election. In every sense, the facts in Drueding are parallel to the facts in this case.

The Court in Drueding noted that there are two purposes in such a statutory residency provision:

1. Identifying the voter and protecting against fraud.

2. Insuring that the voter will in fact become a member of the community, and as such have a common interest in all matters pertaining to its government. The fully reasoned opinion by Judge Thomsen expressed the personal opinions of the Judges that the objectives of the statute could probably be attained by a shorter residency requirement, but concluded that the Court was not at liberty to substitute its personal views for those of the legislature in the absence of a showing of unreasonable discrimination. After carefully considering the applicable Supreme Court decisions, the Court concluded that the residency requirements were not so unreasonable as to amount to an irrational discrimination.

The Supreme Court of Colorado has stated that the purposes of residency requirements are:

1. To preserve the purity of elections. Mauff v. People, 52 Colo. 62, 123 P. 101 (1912).

2. To prevent the control of state affairs by persons who have no pecuniary interest in them. Merrill v. Shearston, 73 Colo. 230, 214 P. 540 (1923). While the purpose mentioned in Merrill has no application in this case since the plaintiffs want to vote only in the presidential election, the state's interest in preserving the purity of its elections is very much present. Some time limit must be set for

determining who is and who is not a resident of Colorado for the purposes of voting, not only to preserve the purity of the election, but also for administrative reasons. In line with the personal opinions of the Judges in Drueding that the objectives of residency requirements could probably be attained in a period less than a year, Colorado has chosen to amend its Constitution and pursuant to that amendment the Colorado legislature has provided a time limit of six months for presidential elections. We are not at liberty to substitute our personal views of what time limit would accomplish the objectives of a residency requirement for the judgment of the Colorado legislature in the absence of a showing of unreasonable discrimination.

The Court in Drueding held that a one year residency requirement was not so unreasonable as to amount to an irrational discrimination, and it was affirmed per curiam by the Supreme Court. The Supreme Court in that case had a clear opportunity to accept the contention that lengthy residency requirements are unreasonable and to set forth guidelines as to what time period would be reasonable. This recent indication of the Supreme Court's viewpoint cannot be ignored. Accordingly, we hold that the Drueding decision is positive authority for dismissal of the complaint and for denial of relief.[7] The

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7. The Voting Rights Act of 1965 did not overrule Drueding since it is only applicable

Clerk is therefore ordered to dismiss the complaint and to dismiss the cause of action.[8]

DATED at Denver, Colorado, this 29th day of November, A.D. 1968.

BY THE COURT:

/s/ Delmas C. Hill
DELMAS C. HILL, Circuit Judge
Tenth Circuit Court of Appeals

/s/ Ewing T. Kerr
EWING T. KERR, Chief Judge
United States District Court
District of Wyoming

/s/ William E. Doyle
WILLIAM E. DOYLE, Judge
United States District Court
District of Colorado

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7. (continued)
to invidious state action, such as discrimination based on race, color or creed. There was absolutely no evidence, nor was it even contended, that Colorado's six month residency requirement discriminates against a class of citizens by reason of race, color, creed, or other invidious ground.

8. The members of the Court recognize the unfairness and injustice in depriving the plaintiffs of their vote. However, we are powerless to remedy this since we must follow the law.

SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
JAN 24 1969
JOHN F. DAVIS, CLERK

In The Supreme Court Of The United States

October Term, [redacted] 1969

No. [redacted] 39

RICHARD HALL AND CHRISTINE HALL,

Appellants

v.

HARRIET BEALS, Clerk and Recorder of El Paso County, and BESS TITUS, Election Supervisor of El Paso County,

Appellees

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MOTION TO DISMISS OR AFFIRM UNDER RULE 16

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In The Supreme Court Of The United States

October Term, 1968

No. 950

RICHARD HALL AND CHRISTINE HALL,

Appellants

v.

HARRIET BEALS, Clerk and Recorder of El Paso County, and BESS TITUS, Election Supervisor of El Paso County,

Appellees

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MOTION TO DISMISS OR AFFIRM

Appellees move the Court to dismiss the appeal herein, or to affirm the judgment sought to be reviewed on the appeal,

on the following grounds:

I. IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THIS CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

The questions presented by appellants would be substantial in a de novo setting, but it has long been settled that the various States have the power to prescribe reasonable and nondiscriminatory qualifications for voting in federal (including presidential) as well as state elections. Constitution of the United States, Article II, Section 1; Minor v. Happersett, 21 Wall. 162, 177, 22 L. Ed. 627 (1875); Pope v. Williams, 193 U.S. 621, 632-633 (1904); Lassiter v. Northampton County Board of Elections, 360 U.S. 45, 50-51 (1959); Drueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964), aff'd per curiam, 380 U.S. 125 (1965); Carrington v. Rash, 380 U.S. 89, 91 (1965); Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966).

Specifically, this Court has recently upheld, per curiam, the reasonableness of a one-year residency requirement of the State of Maryland prerequisite to voting in elections for President and Vice-President of the United States. Drueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964), aff'd per curiam, 380 U.S. 125 (1965). In Drueding, a Three-Judge Federal District Court and this Court were faced with the

identical questions here presented. The facts, except for names and dates, are identical to those in the instant case. It, therefore, must be considered controlling as to the disposition of this case. The Three-Judge Federal District Court, below, so held. A fortiori, since the Colorado residency requirement, in voting for President and Vice-President, is only six months rather than Maryland's one year, the Colorado residency statute is certainly reasonable.

Drueding remains the law as to the questions presented in this case as there has been nothing to mollify its impact since it was affirmed per curiam by this Court in 1965.

a. The "equal protection" argument.

As to this argument appellants cite only two cases decided since Drueding, i.e., Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); and Williams v. Rhodes, 37 U.S. L. Week 4001 (October 15, 1968). Both can be clearly distinguished.

First, Harper, itself, states, by way of dictum, that the states have the power to fix voter qualifications within the constitutional framework. (Emphasis supplied). It quotes Lassiter v. Northampton Election Board, 360 U.S. 45, 51 (1959), to this effect at 383 U.S. 665. Also, the Court in Harper, states:

> "Thus without questioning the power of a State to impose reasonable residence restrictions on the availability of the ballot (see Pope v. Williams, 193 U.S. 621) . . . ." 383 U.S. 663, at 666.

Finally, Harper deals with a subject clearly distinguishable from state residence requirements, i.e., the poll tax. Harper, therefore, is clearly inapplicable to the instant case.

Second, Williams v. Rhodes, 37 U.S. L. Week 4001 (October 15, 1968), can be clearly distinguished because it applies to a subject area wholly separate and apart, i.e., political Parties being listed on a Presidential ballot. It is interesting to note that this Court stated in its majority opinion:

> "And as we have said, the State is left with broad powers to regulate voting, which may include laws relating to the qualification and functions of electors." Id at 4004.

In conclusion, there is nothing contained in appellants' "equal protection" argument to lessen the controlling force of Drueding in the instant case.

b. The "privileges and immunities" argument

In this argument, appellants cite a number of cases decided since Drueding which they contend mollify the controlling impact of Drueding on the instant case. Appellees vigorously differ with their contentions for the following reasons. Appellants' cited cases will be taken in order:

The welfare residency cases are clearly distinguishable. For example, Green v. Department of Public Welfare, 270 F. Supp. 173 (D. Del. 1967), specifically distinguishes Drueding in stating:

> "But certainly it takes little logic to conclude that the need for food, clothing and lodging has an aspect of immediacy which differentiates it in kind from the right to vote," Id. at 178.

Also, Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), interestingly distinguishes welfare residency from voting residency by quoting Carrington v. Rash, 380 U.S. 89, 96 (1965):

> "Texas is free to take reasonable and adequate steps *** to see that all applicants for the vote actually fulfill the requirements of bona fide residence." 270 F. Supp. at 338

Then, appellants cite United States v. Classic, 313 U.S. 299 (1941), to the effect that the right to vote for federal Congressmen is clearly a right of national citizenship. This is undisputed, but it must be pointed out that Classic clearly states that this right springs from Article I, Section 4, of the Constitution of the United States and not from the Fourteenth and Fifteenth Amendments. Id. at 315. It is submitted therefore that appellants' cite of Classic in conjunction with their "privileges and immunities" argument is inappropriate. Likewise with United States v. Original Knights of the Ku Klux Klan, 250 F. Supp. 330 (D. La. 1965), also relied upon by appellants. Id. at 352, 354.

Finally, appellants cite United States v. Buck, 18 F. Supp. 213 (D.C. Mo. 1937). This is clearly inappropriate because on appeal, reported as Walker v. United States, 93 F.2d 383 (8th Cir. 1937) (cited incorrectly by appellants as 93 F.2d 385), it was held:

> "Manifestly, the right to vote for presidential electors depends directly and exclusively on state legislation," Id. at 388, 389.

thereby reversing the lower court, as to Count I of the conspiracy. Certiorari was denied by this Court at 303 U.S. 644 (1937). Clearly, therefore, United States v. Buck, Id., on appeal, reported as Walker v. United States, Id., does not support appellants' argument.

In conclusion, there is nothing contained in appellants' "privileges and immunities" argument to lessen the controlling impact of Drueding on the instant case.

Clearly, therefore, the Colorado residency statute is neither in violation of the equal protection clause nor the privileges and immunities clause of the Fourteenth Amendment. No new substantial question is therefore raised by the appellants which requires further argument in this Court.

II. THE ISSUES ALREADY HAD BECOME MOOT PRIOR TO THE ENTRY OF APPEAL IN THIS COURT.

Appellants filed their notice of appeal to this Court on December 13, 1968. The Presidential Election, as to which relief was sought, occurred on Tuesday, November 5, 1968. The issues, therefore, had become moot prior to appeal to this Court. This Court in Mills v. Green, 159 U.S. 651 (1895) aptly settled this same question by stating:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried

> into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal."

In conclusion, the appellants now have fulfilled the six-month residency requirement of the State of Colorado, and are therefore fully eligible, in this respect, to vote in the next Presidential Election scheduled for November, 1972, Appellants, therefore, are no longer adverse parties with sufficient legal interests to maintain this litigation on appeal.

This appeal should therefore be dismissed for mootness, and the judgment below should be allowed to stand unmodified.

III. CONCLUSION

For the foregoing reasons, this appeal should be dismissed, or the judgment sought to be reviewed on the appeal should be affirmed.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

JUL 14 1969

JOHN F. DAVIS, CLERK

In The Supreme Court Of The United States

October Term, 1969

No. 39

RICHARD HALL AND CHRISTINE HALL,

Appellants

v.

HARRIET BEALS, Clerk and Recorder of El Paso County, and BESS TITUS, Election Supervisor of El Paso County,

Appellees

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

APPELLANTS' BRIEF ON THE MERITS

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Appellants, appearing personally pursuant to the provisions of 28 U.S.C. Section 1654.

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In The Supreme Court Of The United States

October Term, 1968

No. 950

RICHARD HALL AND CHRISTINE HALL,

Appellants

v.

HARRIET BEALS, Clerk and Recorder of El Paso County, and BESS TITUS, Election Supervisor of El Paso County,

Appellees

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

APPELLANTS' BRIEF ON THE MERITS

OPINION BELOW

The official report of the opinion delivered by the Court below, the United States District Court for the District of Colorado, is contained at 292 F. Supp. 610 (D. Colo., 1968). A copy of that opinion is contained in the Appendix, beginning at page 15.

JURISDICTION

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1253 as a direct appeal from an order of the three-judge District Court denying, after notice and hearing, an injunction in a civil action that sought to enjoin the enforcement of Colorado's residence requirement for voting for President and Vice-President, CRS 49-24-1 et seq. (1963). Such civil action was required by an Act of Congress to be heard by a three-judge District Court, 28 U.S.C. §§ 2281, 2284.

The appeal was taken within the time limit prescribed by 28 U.S.C. § 2101 (b), which is 60 days from the date of the final order. The judgment for defendants was rendered on October 30, 1968, and the Notice of Appeal was filed December 13, 1968 (see Appendix, Relevant Docket Entries, page ii). The appeal is "taken" as required by 28 U.S.C. § 2101 (b) when the Notice of Appeal is filed, see Rules 10 (1) and 11 of the Rules of the Supreme

Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the alleged unconstitutionality of CRS 49-24-1 (1963), which read at the time of the Complaint and at the time of the hearing in District Court as follows:

> "49-24-1. Eligibility of new resident to vote.-- Any citizen of the United States who shall have attained the age of twenty-one years, shall have resided in this state not less than six months next preceding the election at which he offers to vote, in the county or city and county not less than ninety days, and in the precinct not less than fifteen days, and shall have been duly registered as required by the provisions of this article, shall have the right to vote as a new resident for presidential and vice-presidential electors." (Emphasis added).

This statute was amended by the State of Colorado on April 23, 1969, to read as follows:

> "49-24-1. Eligibility of new resident to vote.-- Any

citizen of the United States who shall have attained the age of twenty-one years, who shall have resided, next preceding the election at which he offers to vote, in this state and in the county or city and county not less than two months, and in the precinct not less than fifteen days, and shall have been duly registered as required by the provisions of this article, shall have the right to vote as a new resident for presidential and vice-presidential electors." (Emphasis added)

It is alleged by the appellants that the statute, both as in effect at the time of the complaint and as amended, is unconstitutional under Section 1 of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of

life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."
(Emphasis added.)

The appellees may claim that the statute is constitutional in that it is authorized by Section 1 (2) of Article II of the Constitution of the United States, which reads as follows:

"Each state shall appoint, in such manner as the Legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the state may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an Elector."
(Emphasis added.)

QUESTIONS PRESENTED FOR REVIEW

1. Whether the six-months residence requirement of CRS 49-2-1 (1963) imposes an unjustified burden upon a would-be voter who moved into the State of Colorado too late to satisfy the requirement and was therefore unable to vote for President and Vice-President;

of his right to travel between the several states, and therefore whether the residence requirement is an unconstitutional infringement of the "right to travel" guaranteed by the Constitution of the United States, with particular emphasis upon the Privileges and Immunities Clause of the Fourteenth Amendment.

2. Whether the six-months residence requirement of CRS 49-24-1 (1963) is a permissible requirement that may be properly imposed by the State of Colorado upon an otherwise qualified voter who seeks to vote only for President and Vice-President, or whether the requirement is an unreasonable and discriminatory one that is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

This is a direct appeal from a decision of a three-judge District Court for the District of Colorado which upheld the constitutionality of CRS 49-24-1 (1963), which statute imposed a six-months residency requirement upon new Colorado residents before allowing them to vote for President and Vice-President. (CRS 49-3-1 [1963] and the Colorado Constitution, Article 7, Section 1, require a one-year residence before allowing one to vote in general, non-Presidential

Appellants, who are husband and wife, moved from the State of California to the State of Colorado on June 15, 1968, upon Mr. Hall's graduation from law school at the University of California, Berkeley, California. Upon their arrival in Colorado, Mr. Hall took permanent employment with the law firm of Quigley, Wilder, Helwig & Palmer in Colorado Springs, and Mr. and Mrs. Hall purchased a home at 1617 North Corona in Colorado Springs, registered their car with the Colorado Department of Motor Vehicles, enrolled their oldest child in a private nursery school, and acquired Colorado drivers' licenses.

On or about August 1, 1968, the appellants sought to register with the appellees to vote in the then-forthcoming national election for President and Vice-President on November 5, 1968, and were informed that they did not meet the six-months requirement of CRS 49-24-1 (1963). (May 5, 1968, was six months before the election and would have been the deadline.) Appellants, who before their move were duly qualified and registered voters in Contra Costa County, California, then appealed to the California election officials for absentee ballots, but were advised that they could not vote in California because they were no longer residents of California. Appellants then applied to the Secretaries of State in

both California and Colorado and were refused ballots in both states. Appellants then, on October 4, 1968, filed this suit in the District Court for the District of Colorado in Denver, Colorado, where their complaint was heard on October 25, 1968, and was turned down on October 30, 1968. This appeal then followed.

Other than the six-months residence requirement of CRS 49-24-1 (1963), appellants were qualified to vote under Colorado law. Both appellants were over twenty-one, native citizens of the United States, and under no known disability such as insanity, commission of a felony, etc., that would have disqualified them from voting. No such disability was raised in the Answer nor at the District Court hearing by appellees, and none was ever presented to appellants by the appellees.

SUMMARY OF THE ARGUMENT

It is contended by the appellants that the six-months residence requirement violates the Federal Constitution on two principal grounds. First, the requirement serves to penalize the new resident's exercise of his fundamental right to travel between states and to establish residence in a new state, a right which is guaranteed and protected by the Federal Constitution. Second, the requirement

violates the Equal Protection Clause of the Fourteenth Amendment in that it is an arbitrary and irrational classification serving no legitimate state purpose or end, yet serving to eliminate a new resident's fundamental right to vote for President and Vice-President.

I. THE "RIGHT TO TRAVEL - PRIVILEGES AND IMMUNITIES" ARGUMENT.

1. The right to travel between the states and to establish residence in any one state is a fundamental right of all citizens, United States v. Guest, 383 U.S. 745 (1966); Shapiro v. Thompson, ___ U.S. ___, 22 L. Ed. 2d 600 (1969). See also Edwards v. California, 314 U.S. 160 (1941). (Mr. Justice Douglas and Mr. Justice Jackson, concurring).

2. Anything that serves to penalize the exercise of this fundamental right to travel is unconstitutional even when admittedly permissible state objectives are being considered unless a compelling state interest is served. Shapiro v. Thompson, supra. This is doubly true when, as in this case, the equally fundamental right to vote is that which is being penalized.

3. Colorado's waiting period requirement, when voting for President and Vice-President, does not serve any legitimate state interests whatsoever,

much less a compelling state interest. Justifications traditionally given for residence requirements do not apply when voting for President and Vice-President.

(a) Residence in Colorado is not relevant to a voter's being a member of the community to be governed by the one to be elected, for such "community" in a Presidential election is the national community, not a state community. Any United States citizen is a member of the national community, and thus has a stake in the outcome of the Presidential election and will be affected by the fiscal policies and political policies of the man chosen to be President, no matter what state he lives in or moves to.

(b) Residence in Colorado does not make a voter any more qualified to vote for President, nor any more familiar with the candidates and issues involved, for such familiarity and knowledge comes from national magazines, TV, and newspapers, national campaign speeches and appearances, and other national sources. The issues involved in the race for President are national in scope.

(c) A six-months waiting period does not preserve or strengthen the purity of elections, nor does it prevent double voting or voter fraud. The sanction that serves these purposes is the oath the voter takes upon registration and the

possible prosecution for perjury should the voter break or violate his oath. This sanction would exist whether or not a six-months waiting period exists.

Nor does the waiting period serve any "administrative purposes," for a voter who does qualify need not apply for the ballot until the Friday before the election CRS 49-24-3 (1963).

In the event the waiting period is felt to serve the purity of elections, the waiting period in question here is too broad and cumbersome a "blunderbuss" to use for such purposes when a simple letter or telephone call to the old state could prevent double voting, cf Shapiro v Thompson, supra, 22 L. Ed. 2d at 616 - 17, and reasonable residence criteria could ensure that all voters really were residents, cf Carrington v. Rash, supra, 380 U S 89, 91 - 96 (1965). Numerous other states get along successfully with shorter residence requirements, and there is no showing that they have been subjected to voter fraud or double voting. Thus, Colorado's waiting period requirement is overly broad, and hurts legitimately qualified voters in addition to whatever uncertain effect it might have on fraudulent voters

4 The "Privileges and Immunities" Clause of the Fourteenth Amendment is a proper constitutional basis for the claimed right to travel While United

States v. Guest and Shapiro v. Thompson, supra, did not specifically ascribe the right to travel to any particular constitutional provision, those cases do cite with approval earlier Supreme Court cases that do rely upon the Privileges and Immunities Clause. See Edwards v. California, supra, and Twining v. New Jersey, 211 U.S. 78 (1908). The Privileges and Immunities Clause covers those privileges and immunities which arise or grow out of the relationship of United States citizens to the national government, Hague v. C.I.O., 307 U.S. 496, 520 - 521 (1939); Twining v. New Jersey, supra, 211 U.S. at 97, which does include the right to travel from state to state, and should include the right to vote for President and Vice-President.

II. THE EQUAL PROTECTION ARGUMENT.

1. The right to vote is a fundamental and basic right of all citizens, and can be limited by the states only for compelling state interests. Kramer v. Union Free School District No. 15, ____ U.S. ____, 37 Law Week 4530 (1939); Williams v. Rhodes, 393 U.S. 23, 30 - 31 (1968). Any restrictions upon the right to vote will be closely scrutinized and carefully confined. Harper v. Virginia Board of Elections, 383 U.S. 663, 670 (1966); Reynolds v. Sims, 377 U.S. 533, 561 - 562 (1964).

2 When evaluating voter qualifications against the Equal Protection Clause, this Court must consider the facts and circumstances of the law, the interests which the state claims to be protecting, whether the classification bears a reasonable and just relation to the purposes allegedly served, and the interests of those disadvantaged by the classification. Kramer v Union Free School District No. 15, supra; Williams v. Rhodes, supra, 393 U S at 30 (1968); McLaughlin v Florida, 379 U S 184, 190, 191 (1964)

3 The six-months waiting period does not serve any state purposes, much less a compelling interest, and is unreasonable, arbitrary, overly broad, and unconstitutional discrimination in violation of the Equal Protection Clause. This can be seen for the same reasons put forth under the "right to travel" argument summarized above

III. ARTICLE II, SECTION 1 OF THE UNITED STATES CONSTITUTION DOES NOT AUTHORIZE OR JUSTIFY ANY STATE RESTRICTION UPON THE RIGHT TO VOTE OR THE RIGHT TO TRAVEL THAT IS IN VIOLATION OF SOME OTHER CONSTITUTIONAL PROVISION

States have attempted to rely upon this constitutional provision to justify other voter qualification and election requirements, and this Court has held

that Article II, Section 1 does not justify a requirement which is in violation of some other provision in the Constitution. Williams v. Rhodes, supra, 393 U.S. at 28 - 29; Katzenbach v. Morgan, 384 U.S. 641, 647 (1966). See also Carrington v. Rash, supra, and Harper v. Virginia Board of Elections, supra

IV. PREVIOUS CASES WHICH WERE RELIED UPON BY THE DISTRICT COURT BELOW TO SUPPORT ITS DECISION DO NOT REQUIRE THE RESULT REACHED, CAN BE DISTINGUISHED FROM THIS CASE, AND HAVE BEEN CHANGED BY RECENT DEVELOPMENTS IN THE LAW.

(a) Drueding v. Devlin, 234 F. Supp. 721 (D. Md., 1964), affirmed per curiam, 380 U.S. 125 (1965), is the leading case involving the question presented here. Appellants contend Drueding is not controlling. First, appellants feel Drueding was incorrectly decided by the District Court, and was later affirmed per curiam by this Court without the advantages of considering written briefs and oral argument.

Even assuming Drueding was correctly decided at the time, the developments in the law since Drueding compel a result different to the one reached in that case. Williams v. Rhodes and Katzenbach v. Morgan, supra, eliminated any reliance upon Article II, Section 1 of the U.S. Constitution. Kramer v. Union Free School

District No. 15, Williams v. Rhodes and Harper v. Virginia Board of Elections, supra, established the compelling interest test with close scrutiny standards of evaluation upon voter restrictions. Harper v. Virginia Board of Elections and Carrington v. Rash, supra, struck down particular voter qualifications imposed by states. Finally, a new legal concept, the right to travel, has been set forth in Shapiro v. Thompson, supra, and yet was not before the Drueding Court. Chief Justice Warren and Mr. Justice Black felt that Shapiro v. Thompson requires a result opposite to that reached in Drueding, Shapiro v. Thompson, 22 L. Ed. 2d at 627.

(b) Pope v. Williams, 193 U.S. 621 (1904) specifically left open the question of the right to vote for electors of President and Vice-President, 193 U.S. at 633, and any citation of Pope must therefore be dictum in this case.

(c) Carrington v. Rash and Harper v. Virginia Board of Elections, supra, mention "reasonable" residence requirements in dictum not in context here and both cite Pope v. Williams, supra, as authority when Pope left open the question presented here. Carrington and Harper went on to strike down the voter qualification in question in each case.

(d) Lassiter v. North Hampton

of the last three national elections for President have been decided by very slim margins. In 1960 the difference in popular vote between John F. Kennedy and Richard M. Nixon was only 118,000, U. S. Department of Commerce, Statistical Abstract of the United States, 1964 (Government Printing Office), p. 369, while in 1968 the difference in popular vote between Richard M. Nixon and Hubert H. Humphrey was 399,704, Associated Press final election returns, December 11, 1968, contained in Congressional Quarterly, December 13, 1968, p. 3278. In both these elections, even using the lowest estimate of two million for the number of disenfranchised voters, the number of voters prevented from voting because of state, county and precinct residence requirements was approximately five times the amount necessary to change the result in 1968, and fifteen times the amount necessary in 1960.

The election of this country's President and Chief Executive should not be limited in such fashion, unless compelling reasons support such limitation. The appellants contend that no such compelling reason is served by the imposition of state waiting period requirements when a voter seeks to vote only for President and Vice-President, and therefore the waiting period requirement is unconstitutional for two reasons, either one of which would be sufficient for this Court to strike down the requirements:

First, the waiting period aspect of a state residence requirement prevents a newly arrived resident from voting in the Presidential election, and therefore serves to penalize his exercise of his fundamental and constitutionally guaranteed "right to travel" between the several states, without the justification of serving a compelling state interest.

Second, the state residence requirement is without any logical or practical justification and serves no state interest, yet grants the franchise in a selective manner, thus constituting arbitrary and invidious discrimination in violation of the "Equal Protection" clause of the Fourteenth Amendment.

The District Court below in this case recognized the "unfairness and injustice of depriving the [appellants] of their vote," but considered itself "powerless to remedy this since we must follow the law." 292 F. Supp. 610, 615 - f.n. 8 (D. Colo., 1968), Appendix, p. 26. Appellants hope that this Court will recognize that the "law," as set forth infra, compels a reversal of the District Court, and that the injustice of depriving appellants and millions of other voters of their right to vote will be remedied.

I. THE "RIGHT TO TRAVEL - PRIVILEGES AND IMMUNITIES" ARGUMENT.

1. THE RIGHT TO TRAVEL BETWEEN THE STATES IS A FUNDAMENTAL RIGHT OF ALL UNITED STATES CITIZENS.

It is well settled that a citizen of the United States has a fundamental right to travel between the several states and to take up residence in any one state. Shapiro v. Thompson, ____ U.S. ____, 22 L. Ed. 2d 600 (1969); United States v. Guest, 383 U.S. 745 (1966); Edwards v. California, 314 U.S. 160, 178-185 (Douglas and Jackson, J. J., concurring) (1941); Twining v. New Jersey, 211 U.S. 78, 97 (1908); Slaughter-House Cases, 16 Wall. 36, 79 (1872); Crandall v. Nevada, 6 Wall. 35 (1868); Passenger Cases, 7 How. 282 (1849).

This right is not attributed solely to any particular constitutional provision, for

> "[I]t suffices that, as Mr. Justice Stewart said for the Court in United States v. Guest, 383 U.S. 745, 757-758 (1966):
>
> "'The constitutional right to travel from one state to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

> "'[The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.'" Shapiro v. Thompson, supra, 22 L. Ed. 2d at 612 - 613.

While appellants, in their Complaint and in their Statement as to Jurisdiction, relied upon the "Privileges and Immunities" clause of the Fourteenth Amendment as the Constitutional basis for the claimed "right to travel," and such reliance is well-supported by previous cases, Edwards v. California, supra, J.J. Douglas and Jackson concurring opinions; Twining v. New Jersey, supra; Crandall v. Nevada, supra, appellants contend that the language of the Shapiro and Guest cases is relevant and equally controlling in this case. Appellants, when moving from California to Colorado in June of 1968, were clearly exercising their fundamental and constitutionally guaranteed right to travel as they were perfectly entitled to do.

2. ANYTHING THAT SERVES TO PENALIZE

THE EXERCISE OF THIS FUNDAMENTAL RIGHT TO TRAVEL IS UNCONSTITUTIONAL UNLESS IT IS SHOWN TO SERVE A COMPELLING STATE INTEREST.

This rule of law has been clearly laid down by this Court in Shapiro v. Thompson, supra, 22 L. Ed. 2d at 615, 617. Even where "admittedly permissible state objectives" are concerned, anything that serves to penalize the exercise of the right to travel is unconstitutional unless it promotes a compelling state interest. Ibid. It must merely "serve to penalize" the exercise of the right -- i.e. if it has the effect or result of penalizing the exercise. Even though there is no deliberate state intention or design of so penalizing the new resident, it is unconstitutional if it serves to penalize him.

Thus, while appellants do not contend that the State of Colorado had the impermissible objective of wanting to keep new residents out of the state, as was the basis for the alternate holding of Shapiro (22 L. Ed. 2d at 611 - 614), it is perfectly clear that Colorado's residence requirement served to penalize appellants' exercise of their right to travel from California to Colorado. If they had stayed in California they could have voted for President. The "penalty" is clear-cut and absolute, and was created solely by the move from California to Colorado.

In addition, when evaluating the weight or magnitude of the "penalty", it must be remembered that what was lost as a result of the penalty on the "right to travel" was the "right to vote" for President and Vice-President. The "right to vote" has been held to be a fundamental right that preserves all other rights, deserving of the most careful protection and to be limited only for compelling state interests. Kramer v. Union Free School District No. 15, ___ U.S. ___, 37 Law Week 4530 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965); Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964). Thus, the rationale of Shapiro v. Thomas, supra, is doubly enhanced by the fact that this case combines the "right to travel" with the "right to vote."

Thus, unless a compelling state interest is promoted by the state waiting period requirement, the requirement is unconstitutional. The "mere showing of a rational relationship" is not enough; the state interest must be compelling. Shapiro v. Thompson, supra, 22 L. Ed. 2d at 615, 617.

3. COLORADO'S WAITING PERIOD PORTION OF ITS RESIDENCE REQUIREMENT, WHEN VOTING FOR PRESIDENT AND VICE-PRESIDENT, DOES NOT SERVE ANY LEGITIMATE STATE INTEREST WHATSOEVER, MUCH LESS A COMPELLING STATE INTEREST.

Several justifications are traditionally put forth to support residence requirements:

(a) A residence requirement insures that the voter is a member of the "community" to be governed, and thus that the voter has a personal stake in the election outcome and will therefore cast his vote responsibly.

(b) A residence requirement insures that the voter is familiar with the candidates and the issues, and that he will therefore cast his vote intelligently.

(c) A residence requirement insures that a voter is identified with his present community and thus not with his old community, therefore preventing double voting and election fraud.

Upon evaluation, it will be seen that (a) and (b) do not apply at all to state residence requirements in a Presidential election, and (c) does not apply under the facts and operation of Colorado's election procedures.

(a) The "member of the community" argument is inapplicable in a Presidential election.

The "member of the community" argument assumes that if a voter is not a member of the community to be affected

by the election outcome, he might vote irresponsibly. First, he might interfere with the community's fiscal affairs by approving expenditures for developments which he might use without ever having personally to pay for. Similarly, a voter should not be allowed to vote for candidates if he is not going to be personally governed by the candidate chosen. For example, one should not be able to vote for his friend, relative or political choice in another state, because the voter will not have to live under the official once he is elected.

While this is a very understandable justification, it is simply irrelevant in this case. The "community" involved in a Presidential election is a national one. A citizen of the United States will be affected by the fiscal policies of the elected President and will be governed by the President no matter in which state he lives. The President and Vice-President are the only elected officials that govern the Nation as a whole. Residence in any one state is immaterial.

The District Court below in this case recognized that the "member of the community" argument, at least as applied to the problem of interference with fiscal affairs, was inapplicable in a Presidential election, 292 F. Supp. at 614, Appendix at 24. Appellants, to this extent, agree with the District Court and further argue that it is inapplicable in any other context as well, and therefore would ask this Court to disregard as

immaterial any discussion of the "member of the community" justification.

Even should this Court consider the "member of the community" argument applicable, there is a second reason to disregard it here. Appellants were in fact residents of Colorado and members of the Colorado community at the time of the election. Appellants were at the time of the election and are now affected personally by Colorado fiscal policies and elected officials. This comes from being a resident of Colorado, and appellants do not argue against the requirement that they be residents of Colorado at the time of the election. Appellants only object to the requirement of being a Colorado resident for six months before the election. If one is a resident at the time of the election, that serves the interests of the "member of the community" argument; a waiting period for a particular period of time before the election, which is what is at issue here, does nothing to support the interests allegedly served by the "member of the community" concept.

(b) The "familiar with the candidates and issues" argument is inapplicable in a Presidential election.

A voter should live within the "community" involved, so that he becomes familiar with the candidates, their stands on appropriate issues, and how

the candidates compare and differ. The voter will also have the opportunity to talk to other voters and get their opinions and ideas. This will insure that the voter is able to cast his vote intelligently.

While this may be a valid and desirable concept, appellants point out that the "community" involved is again a national community. A voter becomes familiar with the candidates for President and the issues involved through national sources -- national TV and radio, national news magazines, nationally distributed newspaper stories and columns, campaign appearances throughout the nation, and many other ways. The issues are generally national in scope -- the war in Vietnam, civil rights, law and order, inflation, military defense spending, etc. Even issues peculiar to any one state are usually just local particulars of a nationwide problem -- Federal highway building, conservation, "pork-barrel" projects such as dams and flood control, campus disorders, etc. Voters throughout the nation will be discussing the Presidential candidates and issues, so a voter will be able to discuss and compare ideas no matter where he lives or to where he moves.

Residence in any one state is simply immaterial when considering a voter's ability to cast an intelligent vote in the Presidential election and

does not serve the "familiar with the candidates and issues" concept at all. The interest of the state, when it comes to voting, is limited to the power to fix qualifications. Residence, like wealth, race, creed or color, is not germane to one's ability to participate intelligently in the electoral process of selecting the President, and therefore introduces a capricious and irrelevant factor and should be struck down. The degree of discrimination is irrelevant. Cf. Harper v. Virginia Board of Elections, supra, 383 U.S. at 668.

(c) The six-months waiting period imposed by Colorado's residence requirement does nothing to preserve the purity of the election or to prevent double voting or voting fraud.

The District Court below, 292 F. Supp. at 614, Appendix at pp. 24 - 25, relied upon the necessity to preserve the purity of elections and to prevent double voting and election fraud as a justification for state residence requirements. Appellants agree that regulation of the elections is a legitimate state interest, but point out once again that the six-months waiting period of Colorado's residence requirement is irrelevant and inapplicable to the interests desired to be served.

First, Colorado's own election procedures belie the claim that the six-

months waiting period is designed to prevent voter fraud or to serve an administrative purpose. A new resident, if he qualifies by being in the state for six months, does not have to apply for a ballot until the Friday before the election, CRS 49-24-3 (1963).[3] Thus, Colorado cannot claim that the six-month period is used to verify an applicant's claim of residence or to process his application for a ballot. Colorado evidently feels that it can perform all checks and processing between Friday and Tuesday, and appellants accept Colorado's judgment on that point. In addition, as conceded by appellees when before the District Court, Colorado does not send

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[3] 49-24-3. Application for ballot by new resident.-- Such new resident shall make application for a new resident's presidential and vice-presidential election ballot at the applicant's county of residence not earlier than ninety days before the presidential election nor later than the close of business on the Friday immediately preceding the election. Such application shall state the applicant's full name, address, and precinct, that the applicant is a new resident, is qualified to vote under the provisions of section 49-24-1, and shall not vote or has not voted in such election otherwise than by such ballot. Such application shall be signed personally by the applicant or a member of his family. (Emphasis added).

notice of a voter's registration in Colorado to the voter's old state, thus making no effort to prevent double voting in the old state should the voter try to apply for an absentee ballot there. Thus, Colorado does not pretend to use the six months to check residence in the new state or to take the voter off the rolls in the old state. It is apparent by Colorado's own inaction that the six-months waiting period is neither necessary nor used to try to prevent fraud or double voting. Thus, the District Court below was in error when stating that the six-months waiting period served any "administrative reasons," Appendix, p. 25.

Second, a six-months waiting period provides no sanction to prevent double voting or election fraud. If one wishes to lie or deceive the election officials, he will do so whether there is a waiting period imposed or not. If his deception is discovered, he faces the sanction for committing a perjured oath (in Colorado, such perjury could receive confinement in the penitentiary for from one to fourteen years -- see CRS 49-24-5, 49-24-10 (1), and 49-21-6[4]). However, such sanction for perjury can be imposed if there was no waiting period at all. The voter,

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[4] 49-24-5. Affidavit on return envelope.-- The return envelope for the new resident's ballot shall have printed on its face an affidavit in substantially the following

when applying for the ballot, would simply swear that he has not voted anywhere else, that he will not vote anywhere else, and that he is presently a

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[4] (Continued)

form:

State of Colorado)
) ss.
County of _____)

I, _____, being first duly sworn according to law, depose and say that I am a qualified and registered new resident elector eligible to vote for presidential and vice-presidential electors in precinct _____, county of _____, and state of Colorado; that I have not applied for nor do I intend to apply for an absentee voter's ballot from any other state; that I have not voted and will not vote otherwise than by this ballot; and that my residence address is _____.

_____
Signature of voter

Subscribed and sworn to before me this _____ day of _____, 19_____.

_____
(Title and name of officer authorized by law to administer oaths.)

bona fide resident of Colorado otherwise qualified to vote. If this is true, Colorado's interest in preventing double voting or fraud is met; if it is not true, he can be punished for perjury. A waiting period, by itself, adds nothing to the perjury sanction which Colorado already has, and is therefore superfluous.

Nor is a six-months waiting period a very appropriate safeguard against an

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[4] (Continued)

49-24-10. Penalties. -- (1) Any person who shall willfully make a false statement or affidavit under this article shall be guilty of perjury, and upon conviction thereof, shall be punished as provided in the Colorado election code of 1963.

49-21-6. Perjury. -- Any person having taken any oath or made any affirmation required by articles 1 to 21 of this chapter, who shall swear or affirm willfully, corruptly, and falsely in a matter material to the issue or point in question, or shall suborn any other person to swear or affirm as aforesaid, shall be deemed guilty of perjury or subornation of perjury, as the case may be, and upon conviction thereof shall be punished by confinement in the penitentiary for a term not less than one year nor more than fourteen years.

influx of foreign voters streaming into a state on Election Day. While the state election officials might have legitimate concern over non-bona fide "residents" attempting to move into a state just for Election Day to manipulate an otherwise close race, a six-months waiting period is too long to serve such a purpose, and thus strikes too broadly and results in the disenfranchising of millions of bona fide residents.

Colorado could and should set up reasonable residence requirements such as proof of employment, permanent housing, registration of the automobile, acquisition of a driver's license, etc., to verify that any voter is a bona fide resident and not someone brought in just for Election Day. However, the blanket disenfranchisement of voters without attempting to evaluate whether they are true residents is unacceptable and should be struck down. Cf. Carrington v. Rash, supra, 380 U.S. 89, 91 - 96 (1965), where this Court refused to accept Texas' blanket disenfranchisement of all military personnel, stating that Texas could impose reasonable residence requirements to insure that any serviceman was a true resident, but that the Texas provision was void because it left no room for a voter in the military to prove he was in fact a Texas resident. In this present case, appellants were willing to establish the fact of their residence, and could have met any reasonable requirement

normally used to prove "residence," but were prevented from voting because of an inflexible six-months rule that does not serve the purposes alleged for it.

Put another way, an inflexible, rigid six-months waiting period is too cumbersome a "blunderbuss" to serve against fraud and double voting. When a simple telephone call or letter to the old state would take the voter off the the rolls there and thus prevent double voting, and when a simple affidavit much like the one already contained in CRS 49-24-5 (1963), supra, would provide all the sanction presently available to deter double voting, and when a state could set up reasonable requirements to guarantee "residence" without requiring a "waiting period," it is unreasonable to accomplish these objectives by the blunderbuss method of denying the vote to all newcomers for six months. Cf. Shapiro v. Thompson, supra, 22 L. Ed. 2d at 617, where this Court uses similar language and reasoning to turn aside similar arguments raised in an attempt to support state residence requirements for welfare assistance.

(d) Other states find that a shorter residence is acceptable and have had no problems.

At this point, it might be useful to consider the residence requirements of the other states. This Court, in two similar recent cases, has found it helpful

to see what other procedures or requirements are used by other entities facing the same problem. See Williams v. Rhodes, supra, 393 U.S. at 33, f. n. 9, where the Court considers the percentage requirements necessary to get third parties on the ballot in 42 other states, and Shapiro v. Thompson, supra, 22 L. Ed. 2d at 617, where the Court evaluates procedures used by the District of Columbia to prevent double welfare payments and to provide interim assistance when a new resident moves into the District. When deciding what is "reasonable" and what else might serve the desired ends, it should be helpful to see what other states have come up with for residence requirements in Presidential elections.

The state-imposed residence requirements of the other 49 states for voting for President and Vice-President are collected in Table I to this Brief. As seen in Table I, 21 states plus New Mexico, whose try for a special requirement has been declared unconstitutional, have only a general residence requirement applicable in all elections, including the Presidential election. These requirements are grouped as follows:

2 years - 1 state	Mississippi
1 year - 15 states (plus New Mexico)	Alabama, Arkansas, Hawaii, Kentucky, Louisiana, Montana,

	Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming (and New Mexico, whose special requirement has been declared in violation of the State Constitution).
6 months - 3 states	Indiana, Iowa, and Nevada.
3 months - 2 states	New York and Pennsylvania.

Twenty-nine states, including Colorado, have adopted special requirements for Presidential elections. These special requirements have taken two forms. First, a remedy of a type not at issue here but one that seeks to solve the same problem, some states allow a former resident who has moved out of his "old state" to retain his voting residency in the old state for a certain period of time unless and until he can meet the residence requirement of his "new state." Eight states have adopted this technique, as follows:

Until qualified in new state - 3 states	Michigan, New Jersey and Wyoming

24 month retention - 3 states	Connecticut, Texas, and Wisconsin
15 month retention - 2 states	Arizona and Vermont.

Finally, in response to a 1962 proposal of the National Conference of Commissioners on Uniform State Laws, 28 states plus New Mexico have established special, shorter residence requirements or time limits for registration for new residents seeking to vote in the Presidential election in their "new state." These requirements are grouped below:

6 months -	formerly Colorado, the subject of this suit.
3 months - 1 state	Delaware.
60 days - 8 states, plus Colorado	Arizona, Colorado (after amendment since this suit began), Connecticut, Idaho, Illinois, Missouri, North Carolina, Texas, and Washington
54 days - 1 state	California.

45 days - 2 states	Kansas and Maryland.
40 days - 1 state	New Jersey
31 days - 1 state	Massachusetts
30 days - 8 states (including New Mexico)	Florida, Georgia, Maine, Michigan (in city or township), Minnesota, New Hampshire, New Mexico (declared unconstitutional in violation of State Constitution), and Oregon
15 days - 1 state	Oklahoma.
10 days - 1 state	North Dakota.
4 days - 2 states	Alaska and Ohio
2 days - 1 state	Nebraska.
No minimum - 1 state	Wisconsin

In summary, 20 states (when including New Mexico, whose special shorter requirement is inoperative) have general

requirements of six months or more, while 30 states have either general or special requirements ranging from three months down to no residence requirement or application time limit at all. Thus, three-fifths of the states feel they can operate with a residence requirement of three months or less, and sixteen states, not counting New Mexico, require 40 days or less. Five states use 10 days or less, including one state with no requirement at all. Appellants are not aware of any voter fraud or perjured oaths in these states with shorter requirements. Fourteen states (Colorado, plus Delaware, Florida, Georgia, Idaho, Maine, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Texas, and Washington -- the other states not responding to this particular question by the time for submission of this Brief) stated affirmatively in letters to the appellants that they had no known problems of voter fraud or perjured oaths when using their special requirements.

This analysis of the other states' requirements suggests that the substantial majority of other states get by successfully with requirements shorter than six months, and that the prevention of voter fraud or double voting is not a significant problem. In addition, most states using special requirements provide notice of a new resident's registration to the election officials of the old state, and some of these states require confirmation

of disenrollment from the old state before allowing the new resident to vote in the new state. These two simple additional requirements that are used without apparent administrative burden by several states would effectively guarantee elimination of any double voting or fraud, and require only an exchange of letters, which can be completed in a week or two at most, or a telephone call, which is instantaneous.

As in Shapiro v. Thompson, supra, when such simple steps are available to serve the state's interest in preventing fraud, the grossly over-restrictive and logically inapplicable waiting period requirement should not be allowed to continue to infringe upon the fundamental and highly prized "right to travel" and "right to vote."

4. THE "PRIVILEGES AND IMMUNITIES" CLAUSE OF THE FOURTEENTH AMENDMENT IS A PROPER AND VALID CONSTITUTIONAL BASIS FOR THE CLAIMED "RIGHT TO TRAVEL."

Appellants contend that the Privileges and Immunities Clause of the Fourteenth Amendment is a proper and valid basis for the claim of a constitutional "right to travel." The later cases of United States v. Guest and Shapiro v. Thompson, supra, do not rely solely and specifically upon the Privileges and Immunities Clause, but certainly cite with approval cases such as Edwards v. California and Twining v. New Jersey,

supra, that do rest upon the Privileges and Immunities Clause. Shapiro does not "ascribe the source of this right to travel interstate to a particular constitutional provision," 22 L. Ed. 2d at 612, but cites as part of the historical development those cases, Edwards and Twining, that do rely upon the Fourteenth Amendment's Privileges and Immunities Clause, ibid, f. n. 8.

The Shapiro dissents of Chief Justice Warren and Mr. Justices Black and Harlan suggested they felt that the Privileges and Immunities Clause was inapplicable in Shapiro because Congress had approved one-year residence requirements for welfare by the enactment of 42 U.S.C. § 602 (b). However, that statute is not pertinent here, and there is no issue of Congressional "approval" of state residence requirements for voting present in this case. Thus, even under the Shapiro dissents, the Privileges and Immunities Clause of the Fourteenth Amendment should apply in this case. This is a state-imposed restriction, and infringes upon the "right to travel." It appears agreed that "there is a constitutional 'right to travel' between States free from unreasonable governmental interference." United States v. Guest, supra, 383 U.S. at 763 (Mr. Justice Harlan, dissenting).

The Privileges and Immunities Clause has most often been interpreted to cover

those privileges and immunities which "arise or grow out of the relationship of United States citizens to the national government," Shapiro v. Thompson, supra, Mr. Justice Harlan dissenting, 22 L. Ed. 2d at 634, citing Hague v. CIO, 307 U.S. 496, 520 (1939). See also Twining v. New Jersey, 211 U.S. 78, 97 (1908). These "privileges and immunities" have included the right to travel from state to state, Crandall v. Nevada, Twining v. New Jersey, Edwards v. California (J.J. Douglas and Jackson, concurring), supra.

In addition, the facts of this case made the Privileges and Immunities Clause doubly applicable. Not only was the "right to travel" infringed; the right to vote for President and Vice-President was also infringed. It is difficult to imagine a right more closely associated with the national government or one that more plainly "grows out of the relationship of United States citizens to the national government" than the right to vote for President and Vice-President. The President and Vice-President are the only officials elected by the Nation as a whole to govern the Nation as a whole. The right to vote for Congressman and Senator is clearly a right of national citizenship, Ex Parte Yarborough, 110 U.S. 651 (1884); United States v. Classic, 313 U.S. 299 (1941), and the right to vote for President should also be such a right. "It is . . . essential to the successful working of this government that the great

organisms of its executive and legislative branches should be the free choice of the people. . .," Ex Parte Yarborough, 110 U.S. at 666 (emphasis added).

II. THE "EQUAL PROTECTION" ARGUMENT.

1. THE RIGHT TO VOTE IS A FUNDAMENTAL RIGHT OF ALL CITIZENS, AND IS TO BE CAREFULLY PROTECTED.

No one can dispute that the "right to vote" is a highly prized and carefully guarded right of all citizens in a democracy.

> "[W]e have said with reference to the right to vote:
>
> "'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'" Williams v. Rhodes, 393 U.S. 23, 31 (1968), citing Wesberry v. Sanders, 376 U.S. 1, 17 (1964) and Carrington v. Rash, 380 U.S. 89 (1965).

This has been understood and appreciated by this Court since Ex Parte Yarborough, 110 U.S. 651, 664 - 666 (1884). See

also Kramer v. Union Free School District No. 15, supra; Harper v. Virginia Board of Elections, supra; Reynolds v. Sims, 377 U.S. 533 (1964).

If the right to vote is important at any time, it is doubly important in the national election of the President and Vice-President. They are the only officials elected by the Nation as a whole, and it is in their election that our democratic process is revealed best. The entire world watches the election of the American President and Vice-President. Their election represents the voice of all of us in choosing our leaders and our course for the Nation as a whole. Their actions affect all of us from coast to coast, and are felt around the world. A President sets the tone and pace and atmosphere for the country as a whole. The President, in the eyes of the rest of the world, "is" the United States, and his choice is the keystone of our electoral process. The right to vote for one's nation's leader is the most precious jewel in the democratic crown of free elections and citizen participation, and should be most carefully guarded.

2. ANY RESTRICTIONS UPON THE RIGHT TO VOTE ARE TO BE CLOSELY SCRUTINIZED AND CAREFULLY CONFINED, AND THE RIGHT TO VOTE MAY BE LIMITED ONLY FOR COMPELLING INTERESTS.

"We have long been mindful that

where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." Harper v. Virginia Board of Elections, supra, 383 U.S. at 670; see also Reynolds v. Sims, supra, 377 U.S. at 561 - 562 ("carefully and meticulously scrutinized"). This Court recently, in Williams v. Rhodes, supra, used an equally stringent test, stating that in the area of political participation and association a compelling state interest must be served to justify any restrictions, 393 U.S. at 30 - 31. Finally, in Kramer v. Union Free School District No. 15, supra, 37 Law Week 4530 (1969), and Cipriano v. City of Houma, 37 Law Week 4598 (1969), this Court spelled out carefully and at length the "close and exacting examination" that faces any statute that grants the franchise in a selective manner. There is to be no presumption of constitutionality, nor will a mere rational basis for the law suffice, but rather the statute must meet a compelling state interest.

These stringent tests are proper when considering the most basic and fundamental of all democratic rights, the right to vote, and should be applied to this case. When such application is made, it is clear that Colorado's six-month waiting period before being allowed to vote for President is unreasonable, arbitrary, and invidious discrimination in

violation of the Equal Protection Clause of the Fourteenth Amendment.

3. THE SIX-MONTHS WAITING PERIOD CONSTITUTES UNREASONABLE AND THUS UNCONSTITUTIONAL DISCRIMINATION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In considering whether a state law violates the Equal Protection Clause, this Court should consider the facts and circumstances of the law, the interests which the state claims to be protecting, whether the classification bears some reasonable and relevant relationship to the state interests or purposes allegedly served, and the interests of those who are disadvantaged by the classification. Kramer v. Union Free School District No. 15, supra, citing Williams v. Rhodes, supra, 393 U.S. at 30, which cited Carrington v. Rash, supra, and Skinner v. Oklahoma, 316 U.S. 535 (1942); see also McLaughlin v. Florida, 379 U.S. 184, 190 - 191 (1964).

"The classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated state goal." Kramer v. Union Free School District No. 15, 37 Law Week at 4531 (emphasis added).

In short, the statute must serve some legitimate state purpose; that purpose when considering the right to vote

must be a compelling state interest; the statute must be relevant and reasonable in light of its alleged purpose; and the statute must be subjected to careful and meticulous scrutiny. Under such an evaluation, Colorado's waiting period is unreasonable and in violation of the Equal Protection Clause. There is no question about the discrimination involved; the statute grants the franchise selectively to a class who can vote and excludes another class who cannot. The only question, then, is whether the waiting period serves any state purpose, and whether it does so in a reasonable and relevant fashion.

This question has been analyzed under the "right to travel" argument, supra, and that analysis need not be repeated here. In very brief recapitulation, appellants argue that a six-months waiting period is totally irrelevant to both the "member of the community" and "familiar with the candidates and issues" justifications normally advanced to support voting-residence requirements. Furthermore, the waiting period, upon analysis, is irrelevant to the "maintain the purity of elections" justification under Colorado procedures and serves no administrative purposes, and, even if considered to be relevant, it is unreasonably long in light of the fact that Colorado could, as numerous other states do, prevent double voting by a simple letter or telephone call to the voter's old state.

III. ARTICLE 2, SECTION 1, OF THE UNITED STATES CONSTITUTION DOES NOT AUTHORIZE OR JUSTIFY ANY STATE RESTRICTION UPON THE RIGHT TO VOTE FOR PRESIDENT THAT IS IN VIOLATION OF SOME OTHER CONSTITUTIONAL PROVISION.

Article 2, Section 1, of the United States Constitution proves that, "Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors. . . ." States have tried to argue that this provision gives them a free hand in imposing whatever voter restrictions they might choose to impose, and that no restriction can be "unconstitutional" in light of Article 2, Section 1. The District Court below erred in relying upon this provision, see Appendix, p. 19, for states do not have a free hand any longer, even assuming they once did.

This argument has been recently and "obviously" rejected, when it was specifically held that "no state can pass a law regulating elections that violates the Fourteenth Amendment's command that "No State shall . . . deny to any person . . . the equal protection of the laws.'" Williams v. Rhodes, supra, 393 U.S. at 29. See also Katzenbach v. Morgan, 384 U.S. 641, 647 (1966), where this Court stated,

> "[T]he States have no power to grant or withhold the fran-

> chise on conditions that are forbidden by the Fourteenth Amendment, or any other provision of the Constitution. Such exercises of state power are no more immune to the limitations of the Fourteenth Amendment than any other state action. The Equal Protection Clause itself has been held to forbid some state laws that restrict the right to vote."

Thus, as far as the Equal Protection argument is concerned, it is clear that Article 2, Section 1, does not authorize any statute if that statute violates the Equal Protection Clause.

As far as the Right to Travel argument is concerned, both Williams v. Rhodes and Katzenbach v. Morgan, ibid., stated that no law could be passed that violated the Fourteenth Amendment or any other constitutional provisions. It is not just the Equal Protection Clause that can override Article 2, Section 1, but any other constitutional provision. Appellants have relied as well upon the Privileges and Immunities Clause to support their "right to travel," as was done in Edwards v. California (concurring opinions) and Twining v. New Jersey, supra. This Court in Shapiro v. Thompson, and United States v. Guest, supra, did not ascribe the right to travel to any particular constitutional provision, but

stated it was clear that the right exists. Thus, Article 2, Section 1, cannot support a law in violation of the "right to travel" either.

Colorado would not now argue that it could impose a poll tax before allowing people to vote, Harper v. Virginia Board of Elections, supra, nor would Colorado argue now that it could bar all servicemen from voting, Carrington v. Rash, supra. By the same token, Colorado should not argue that it, pursuant to Article 2, Section 1, can impose this residence requirement if it violates either the Equal Protection Clause, Privileges and Immunities Clause, or the Right to Travel.

IV. PREVIOUS CASES WHICH WERE RELIED UPON BY THE DISTRICT COURT TO SUPPORT ITS DECISION DO NOT REQUIRE THE RESULT REACHED, CAN BE DISTINGUISHED FROM THIS CASE, AND HAVE BEEN CHANGED BY RECENT DEVELOPMENTS IN THE LAW.

1. Drueding v. Devlin, 234 F. Supp. 721 (D. Md., 1964); affirmed per curiam 380 U.S. 125 (1965).

Drueding v. Devlin is the only case that has considered the problem faced here.[5] Appellants feel that the Drueding

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[5]Appellants do not agree Drueding is

District Court erred in its decision, and that Drueding is an unfortunate mistake that should be remedied so future District

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[5] (Continued)

is factually the same as this case.

Maryland, in Drueding, had only one general residence requirement for all elections, while Colorado, in this case, had established a separate, special requirement for Presidential elections. Colorado thus voluntarily established a new class of voters by singling out a specific problem. Having done so, the particular class and all its restrictions must be judged on its own specific reasoning and justifications. Justifications such as the "member of the community" argument applied to the general all-purpose residence requirement found in Maryland and therefore could be relied upon in Drueding, but those justifications do not apply to Colorado's special Presidential requirement and therefore should not have been relied upon here. Once the franchise was granted to the special class of electorate, lines may not be drawn that are inconsistent with the Equal Protection Clause. Cf. Harper v. Virginia Board of Elections, supra, 383 U.S. at 665.

Thus, any administrative problems foreseen by the Drueding District Court

Courts will not feel compelled to follow the "law" despite recognized "unfairness and injustice" as the District Court below did, Appendix, p. 26, f. n. 8. This Court, when affirming Drueding per curiam, was without the benefit of briefs and oral argument, and should not now, after full briefs and argument, feel compelled to follow its earlier decision.

The Drueding District Court was in error when relying upon the "member of the community" justification to uphold Maryland's residence requirement, 234 F. Supp. at 724. A reading of the Maryland case cited by the District Court, Shaeffer v Gilbert, 73 Md. 66, 20 A. 434, 435 (1890), shows that Shaeffer was discussing the election of state officials ("governor, judge, attorney general, . . ."), and thus is inappropriate in a Presidential context.

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[5] (Continued)

such as the problems of printing special ballots, establishing special registration procedures, providing special voting places and election supervisors, etc . . in order to make an exception to the one basic residence requirement then existing in Maryland, had been eliminated by Colorado's specially adopted procedures. Thus, to judicially overrule Colorado's situation would not upset matters as much as having struck down Maryland's law.

Even if Drueding was once correctly decided, the legal theoretical underpinnings of that case have since been modified by more recent cases. Williams v. Rhodes and Katzenbach v. Morgan, supra, clarified that Article 2, Section 1, could not justify a statute that otherwise violated the Constitution. Kramer v. Union Free School District No. 15 and Williams v. Rhodes, supra, established the "compelling interest" test, and Harper v. Virginia Board of Elections, supra, required careful scrutiny and close confinement of voter restrictions. Carrington v. Rash, supra, struck down an inflexible Texas law that wouldn't allow a bona fide resident to demonstrate his "residence." The Supreme Court is not confined to earlier notions of equality, and those notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change. Harper v. Virginia Board of Elections, 383 U.S. at 669.

In addition, the "right to travel" concept as developed in Shapiro v. Thompson, supra, was not even before either the Drueding District Court or this Court when affirming Drueding per curiam. A newly developed and expanded legal concept is present here, and the Drueding result is off the point when evaluating Shapiro's effect. Former Chief Justice Warren, with whom Mr. Justice Black joined, felt that Shapiro's rationale "would seem to require the opposite conclusion" from Drueding,

Shapiro v. Thompson, supra, 22 L. Ed. 2d at 627, a conclusion firmly agreed with by appellants.

2. Pope v. Williams, 193 U.S. 621 (1904).

Pope v. Williams specifically left open the question of qualifications for someone voting for President and Vice-President: "In this case no question arises as to the right to vote for electors of President and Vice-President, and no decision is made thereon." 193 U.S. at 633. Thus, any citation of Pope must be read as dictum in a case that deliberately left open the question faced here.

3. Minor v. Happersett, 21 Wall. 162 (1875).

Minor v. Happersett has been distinguished in Ex Parte Yarborough, supra, 110 U.S. at 664, where this Court stated that the right to vote for Congressman and Senator is based upon the Constitution that created the offices and pointed the means of ascertaining who should be electors; Yarborough went on to discuss the importance of the right to vote for both the Legislative and Executive branches of our national government, suggesting that Minor v. Happersett is distinguishable when considering Presidential elections as well.

4. Carrington v. Rash, 380 U.S. 89 (1965).

While Carrington did say that "Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot," 380 U.S. at 91, that language is inappropriate here. First, that language was in reply to Texas' argument that military men would be subject to military orders and therefore too transient to be allowed to vote, and should be viewed in that context. This Court, in reasoning that applies to our situation as well, was saying Texas could impose requirements to verify "residence," but went on to say that Texas could not have an inflexible rule that prevents voters who are in fact bona fide residents from establishing their residence. Thus, while Texas (and Colorado) may have a legitimate concern about non-bona fide "floaters" coming in to manipulate a close election and could therefore have requirements to verify "residence" in the state, Texas (and Colorado) cannot have a flat, arbitrary qualification that leaves no room for the bona fide resident. Appellants here could have verified bona fide "residence," and would have been happy to do so, but were prevented from voting because of a "waiting period" that is as inflexible as Texas' no-military rule was in Carrington.

Second, it must be remembered that Carrington spoke only of "reasonable" residence requirements. This, of course, brings up the question of what is "reason-

,able," which must be evaluated in light of the alleged state interests and the relevancy of the classification in respect to the state interests. In the special context of Presidential elections, residence requirements are inapplicable, as has been argued above.

Third, Carrington cited Pope v. Williams, supra, as its authority for the above-quoted statement, and, as seen, Pope specifically leaves open the question of Presidential elections.

Finally, we should not be misled by what can only be dictum. It is far more significant to remember the result of Carrington, which was to strike down as unconstitutional Texas' provision concerning no vote for servicemen-residents.

5. Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

Harper's only mention of residence requirements was in an introductory clause, "Thus without questioning the power of a State to impose reasonable residence restrictions on the availability of the ballot (see Pope v. Williams, 193 U.S. 621). . .", 383 U.S. at 666. This dictum is of no help to appellees here, for, as with Carrington, Harper cited Pope, which left open the question of Presidential elections, talked only of "reasonable" restrictions which thus

requires evaluation in this special context, and was only an introduction in a case that went on to strike down the voter qualification present there.

6. Lassiter v. North Hampton County Board of Elections, 360 U.S. 45 (1959).

Lassiter stated a residence requirement was an "example" of a factor that could be taken into consideration in determining the qualifications of voters, 360 U.S. at 50 - 51. Appellants do not argue with this statement when it is recognized as dictum and only a general recitation of possible factors. In any election save that for President and Vice-President, a reasonable-length residence requirement might serve either the "member of the community" or "familiar with the candidates and issues" justifications. However, Lassiter's "example" should not be read out of context as being controlling here.

V. THIS MATTER IS NOT MOOT, FOR THE PROBLEM CONSIDERED HERE IS ONE THAT WILL AFFECT FUTURE ELECTIONS, AND THEREFORE THE COURT SHOULD CONSIDER THE MATTER ON ITS MERITS.

Appellees, in their Motion to Dismiss or Affirm under Rule 16, raised the question that this case was moot in that the 1968 election is over, and that no relief could be awarded to the appellants. In addition, the Colorado Legislature has

amended the six-months waiting period in question down to two months (the bill became a law on April 23, 1969, some two weeks before probable jurisdiction was noted in this case but after the Statement as to Jurisdiction and the Motion to Dismiss or Affirm had been filed). Appellees presumably will raise both these considerations in their brief on the merits, and will argue that this case should be dismissed as moot. Appellants do not agree that the matter is moot, and ask that this Court consider the questions presented here on their merits.

The fact that the 1968 election is over, and that there is no relief that can be presented to the appellants does not make this matter moot. The problems faced in this case will continue to govern future elections unless they are squarely faced and resolved by the Court here. Millions of otherwise qualified voters will be disenfranchised from voting for President and Vice-President in 1972 by state residence requirements unless the Court discusses the question and thereby provides a definitive answer in this field. There is therefore a continuing controversy in this federal-state area, and the problem is capable of repetition, yet evading review. In a similar situation coming to the Court after the 1968 election was over, the Court turned aside the mootness argument. See Moore v. Ogilvie, ____ U.S. ____, 23 L. Ed. 2d 1, 4-5 (1969). See also

Gray v. Sanders, 372 U.S. 368, 375 - 376 (1963). The matter is one that needs a definitive answer by the Supreme Court, and one which will continue to plague District Courts below in the future Presidential election years unless treated on its merits now.

In addition, appellants are suing as the representatives of a class, and state that there are common questions of fact and law affecting all members of that class. If that class of disenfranchised voters is defined as including voters who will be disenfranchised in 1972 and later Presidential election years by state residence requirements, then there are members of the class who still face the same problem. Appellants, as representatives of that class, therefore can obtain effective relief for a significant portion of the class concerned with this case, and this Court's opinion in this case will have a positive effect and benefit for millions of voters across the country.

As for the question of Colorado having amended the law down to a two-months residence requirement, appellants contend that even this requirement is still too long and therefore unreasonable. Numerous other states have shown that they can get by successfully with a shorter residence requirement, see Table I of this Brief, and any concern which states might have as to double voting or voter fraud can be eliminated by a simple

letter or telephone call to the voter's old state. Cf. Shapiro v. Thompson, supra, 22 L. Ed. 2d at 616 - 617.

In addition, Colorado allows those who do qualify to apply for a ballot up until the Friday before the election, CRS 49-24-3 (1963), supra. If that length of time is adequate for Colorado to perform all administrative processing and checking desired, then no residence requirement longer than that is necessary.

CONCLUSION

The District Court below erred in upholding the six-months waiting period requirement for the following reasons:

1) The waiting period is not used for and does not serve any "administrative purposes," for a voter can register and apply for the ballot up until Friday before the election.

2) The waiting period doesn't serve to maintain the purity of elections, for the perjury sanction does that. Furthermore, the requirement is too broad and serves to penalize legitimately qualified voters.

3) Article 2, Section 1, does not authorize any voter restriction that violates some other provision of the Constitution.

4) Drueding v. Devlin was wrongly decided originally and should not be allowed further to impede the election of our President.

5) The law of Drueding, even if originally correct, has been modified by subsequent decisions.

6) The District Court below did not even discuss the "right to travel - welfare residence" cases that led to Shapiro v. Thompson, although they were presented to the Court.

7) Cases that were relied upon by the Court do not apply in the special Presidential context, and were dictum anyway.

Thus, under the strict standards of the "compelling interest" test required for both the "right to travel" and the "right to vote," this Court should reverse the District Court's opinion and declare the Colorado waiting period requirement of CRS 49-24-1 (1963) (as amended) to be unconstitutional as violating both the Right to Travel and the Equal Protection Clause. Only then will the unfairness and injustice of disqualifying millions of otherwise qualified voters from voting for President and Vice-President cease, thus enabling similar voters in 1972 and future Presidential election years to have a say in the election of the Nation's

leader and to take part in the great American democratic process.

Respectfully submitted,

_____

Richard V. Hall

_____

Christine A. Hall

Appellants, appearing personally pursuant to the provisions of 28 U.S.C. Section 1654.

TABLE I

RESIDENCE REQUIREMENTS IMPOSED BY THE STATES FOR VOTING FOR PRESIDENT AND VICE-PRESIDENT

State	General Requirements	Special Requirements for Presidential Elections
Alabama	1 year; Ala. Code Recompiled 1958, Title 17, § 12	
Alaska	1 year; Alk. Stat., § 15.05.010	4 days; Alk. Stat., § 15.05.012
Arizona	1 year; Ariz. RSA, § 16-101	a) 60 days; Ariz. RSA, § 16-172 b) Retention of residence for 15 months, Ariz. RSA, § 16-171
Arkansas	12 months; Ark. Stat., § 3-101	
California	1 year; Calif. Const., Art. II, § 1	54 days; Calif. Elec. Code, § 751
Colorado	1 year; Colo. Const., Art. VII, § 1, and CRS 49-3-1	6 months (since amended to 2 months), CRS 49-24-1

Connecticut	6 months; Conn. Const., Art. 6, § 1	a) 60 days; Conn. Stat., § 9-163b b) Retention of residence for 24 months, Conn. Stat., § 9-158
Delaware	1 year; Del. Code, Title 15, § 1701	3 months, Del. Code, Title 15, § 4401
Florida	1 year; FSA, § 97.041	30 days; FSA, § 97.031
Georgia	1 year; Ga. Code, § 34-602	30 days; Ga. Code, § 34-602
Hawaii	1 year; Haw. Const., Art. II, § 1, and Haw. R.S., Title 2, § 11-4	
Idaho	6 months; Ida. Code, § 34-401	60 days; Ida. Code, § 34-408
Illinois	1 year; Smith-Hurd Ill. Ann. Stat., Ch. 46:3-1	60 days; Smith-Hurd Ill. Ann. Stat., Ch. 46:3-1
Indiana	6 months; Burns Ind. Stat., § 29-3426	
Iowa	6 months; Iowa Const., Art. II, § 1	
Kansas	6 months; Kan. Const., Art. 5, § 1	45 days; Kan. Const., Art. 5, § 1, and KSA, Ch. 25, § 1801

Kentucky	1 year; Ky. Const., § 145, and Ky. Stat., § 117.605	
Louisiana	1 year; La. Rev. Stat., § 18:31	
Maine	6 months; Me. Rev. Stat., Title 21, § 241	30 days; Me. Rev. Stat., Title 21, § 311.
Maryland	1 year; Md. Const., Art. I, § 1, and Md. Code, Art. 33, § 3-4.	45 days; Md. Code, Art. 33, § 28 - 1,4
Massachusetts	1 year; Mass. Gen. Law, Ch. 51, § 1	31 days; Mass. Gen. Law, Ch. 51, § 1(a)
Michigan	6 months; Mich. Const., Art. 2, § 1, and Mich. Comp. Law, § 168.10	a) 30 days in city or township; Mich. Const., Art. 2, § 3, and Mich. Comp. Laws, § 168.758(a)(1)(b) b) Retention of residence until qualified in new state, Mich. Comp. Laws, § 168.758(a)(1)(b)
Minnesota	6 months; Minn. Stat., 200.02 (25)	30 days; Minn. Stat., 208.21 et seq
Mississippi	2 years; Miss. Stat., Title 14, Ch. 2, § 3235	

Missouri	1 year; Mo. Const., Art. 8, § 2, and Vernon's Mo. Stat., § 111.060	60 days; Vernon's Mo. Stat., § 111.063
Montana	1 year; Rev. Code of Mont., § 23-302	
Nebraska	6 months; Rev. Stat. of Neb., § 32-102	2 days; Rev. Stat. of Neb., § 32-1301
Nevada	6 months; Nev. Const., Art. 2, § 1, and Nev. Rev. Stat., § 293.485	
New Hampshire	6 months; N.H. Rev. Stat., § 54:8	30 days; N.H. Rev. Stat., § 65:1-a
New Jersey	6 months; N.J. Const., Art. II, § 3, and N.J. Stat. Ann., § 19:4-1	a) 40 days; N.J. Const., Art. II, ¶ 3(b), and N.J. Stat. Ann., § 19:58-2 b) Retention of residence until qualified in new state, N.J. Stat., § 19:58-2
New Mexico	12 months; N.M. Const., Art. VII, § 1, and N.M. Stat., § 3-1-1	30 days; N.M. Stat., § 3-17-1 (declared unconstitutional, Op. of Atty. Gen., #67-137)

New York	3 months; McKinney's Consol. Laws, Election Law, Art. 7, § 150	90 days; McKinney's Consol. Laws, Election Law, Art. 7, § 341
North Carolina	1 year; Gen. Stat. of N. Car., § 163-55	60 days; Gen. Stat. of N. Car., § 163-56, 73
North Dakota	1 year; N. Dak. Cent. Code, § 16-01-03	10 days; N. Dak. Cent. Code, § 16-16-18
Ohio	1 year; Page's Ohio Rev. Code, Title 35, § 3503.01	4 days; Page's Ohio Rev. Code, Title 35, § 3504.01 et seq.
Oklahoma	6 months; Okla. Const., Art. III, § 1	15 days; Okla. Stat. 1961, Title 26, § 601 et seq.
Oregon	6 months; Ore. Const., Art. II, § 2	30 days; ORS 247.410 et seq., and ORS 247.070; see Op. of Atty. Gen. #5795
Pennsylvania	3 months; citation unavailable at time of Brief	
Rhode Island	1 year; R.I. Const., Art XXIX, § 1, 2, and Gen. Laws of R.I., Election Law of 1958, § 17-1-3	

South Carolina	1 year; Code of Laws of S. Car., Title 23, § 23-62(3)	
South Dakota	1 year; S. Dak. Code of 1939; Title 16, § 16.0604	
Tennessee	12 months; Tenn Code. Ann., § 2-201	
Texas	1 year; Vernon's Texas Civil Stat., Election Code, § 5.02	a) 60 days; Election Code, § 5.05(a) b) Retention of residence for 24 months, Election Code, § 5.05(b)
Utah	1 year; Utah Code Ann., 1953, § 20-2-11, 13	
Vermont	1 year; VSA, Title 17, § 62	Retention of residence for 15 months, VSA, Title 17, § 67
Virginia	1 year; Code of Va., 1950, § 24-17	
Washington	1 year; Wash. Const., Art. VI, § 1	60 days; Wash. Const., Art. VI, § 1a, and RCW, § 29.72.010

West Virginia	1 year; W. Va. Const., Art. IV, § 1, and W. Va. Code, § 3-1-3	
Wisconsin	6 months; West Wisc. Stat., Title II, § 6.02	a) No minimum; West Wisc. Stat., Title II, § 6.15 b) Retention of residence for 24 months, Title II, § 6.18
Wyoming	a) 1 year; Wyo. Stat. Ann., 1957, § 22-118.3(j) b) Retention of residence until qualified in new state, Wyo. Stat. Ann., 1957, § 22-118.3(k)6	

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No. 39

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OCTOBER TERM, 1969

RICHARD HALL AND CHRISTINE HALL, *Appellants*,

v.

HARRIET BEALS, Clerk and Recorder of El Paso County, and BESS TITUS, Election Supervisor of El Paso County, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF AMICUS CURIAE FOR BIPARTISAN COMMITTEE ON ABSENTEE VOTING

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF AMICUS CURIAE FOR BIPARTISAN COMMITTEE ON ABSENTEE VOTING

Interest of Amicus

There are currently some 750,000 American civilians residing abroad who are barred by the laws of the states of which they are citizens from participating in both national and state elections.[1] In a day when so many Americans pursue commercial, educational, and cultural interests overseas, these numerous citizens are disenfranchised by archaic voting laws in a large majority of the states which in terms or in effect require physical presence in the state for exercise of the ballot. On behalf of the large and increasing number of Americans residing abroad, the Bi-

[1] See 115 Cong. Rec. S5177 (daily ed. May 14, 1969).

partisan Committee on Absentee Voting was formed in 1965 by overseas leaders for the Republican Party (Harvey S. Gerry, Chairman; Edward Tuck, Vice-Chairman) and the Democratic Party (Alfred E. Davidson, Chairman; Richard H. Moore, Vice-Chairman, succeeded by David McGovern). They took this initiative when it appeared that in the 1964 Presidential election very few overseas civilians could meet complex and restrictive state voting requirements applicable to non-resident citizens.

Despite the great growth of the overseas population, many states still treat mere removal to an overseas abode as evidencing surrender of state domicile, and others provide absentee registration and voting procedures only for their citizens in government service.[2] The disenfranchisement of voters residing abroad takes many forms, which are reviewed in a compendium of state laws set forth in Appendix A, *infra*, page 26. In three states, voting eligibility even for a bona fide state domiciliary requires his actual presence in the state or the maintenance of a home there. Ohio permits an absent domiciliary to vote for three years but automatically disqualifies him thereafter. Persons resident abroad who lived and voted in one of these states for years, and continue to regard the state as their home, are thus barred from exercise of the franchise.

---

[2] State and federal legislation has benefited certain groups living abroad —notably members of the Armed Forces and federal employees—but generally provides no relief to the ordinary citizens whose business or personal needs require them to be traveling or living abroad during an election year. See Soldiers and Sailors Voting Law, 56 Stat. 753 (1942); Federal Voting Assistance Act, 69 Stat. 584 (1955). The Congress recommended in 1968 amendments to the Federal Voting Assistance Act (50 U.S.C. § 1451 *et seq.*) that states adopt simplified absentee voting and registration procedures for all citizens "temporarily residing outside the territorial limits of the United States." Only a few states have so far heeded that recommendation, and even then the simplified absentee procedures do not obviate serious legal problems (reviewed in the text, pp. 2-3) concerning the voting *eligibility* of state domiciliaries residing abroad.

Moreover, in 14 states there are statutes or judicial decisions which appear to recognize that non-resident domiciliaries retain voting eligibility, but these statutes and decisions are so equivocal or qualified that even lawyers would differ over the particular citizen's status to exercise the franchise. And in another 11 states the sworn information required upon absentee registration or voting is hopelessly confusing in its requirement that a specific place of state "residence" be stipulated, and induces the ordinary non-resident to forego the franchise for fear of perjuring himself even though as a domiciliary he is in fact a qualified "resident" voter.

Four states disenfranchise overseas domiciliaries because there is no absentee ballot. Twenty-two states, which generally recognize the voting eligibility of the non-resident state citizen deny him equal voting opportunity because they provide no system of absentee registration. In these states an absent voter who is required to register or to re-register (a normal rule upon failure to vote in two successive elections) has no way of meeting that requirement without returning to the state. Combining these various impediments operative in forty-two states* and the District of Columbia—outright disqualification of the absent state citizen, the discouragement from confusing statutes and decisions and voter verification of residence forms, failure to provide absentee voting or registration—reveals a mere handful of states where a non-resident citizen of the state is clearly entitled and enabled to register and vote either in state or national elections while residing abroad.

This case presents the first major review of state residence requirements curtailing voting eligibility in Presidential elections. This Court's pronouncement on what voting residence requirements a state may impose on its

* Since some states fit into more than one category, the figures set forth herein add up to more than 42 states. See Appendix A, *infra*, p. 26.

citizens who recently moved into the state is likely to affect or control also the ambit of state authority to deny the franchise to those sojourning outside the state. Therefore amicus has an intimate interest in the outcome of the present case and, having obtained written consent from the parties, respectfully submits this brief to assist the Court in its disposition of the issues presented. It is our contention that the ruling below is in error because the state has a Constitutional duty under both Article II and the Fourteenth Amendment to afford all its qualified citizens participation in its Presidential elections irrespective of the length or place of their sojourn. That duty is violated by laws denying the Presidential franchise to new citizens of the state, as well as those which disenfranchise the citizen sojourning abroad.

Statement

The question before the Court concerns the requirement of a Colorado statute that a person "shall have resided in this state not less than six months next preceding" an election of Presidential and Vice Presidential Electors in order to participate therein (49-24-1, C.R.S. 1963). There is a crucial fact concerning that statutory requirement which may require illumination: *the statute's six month "residence" prescription does not require that the voter shall actually have been living in the state for six months before the election or at any previous time.* A person may have been living in Colorado for far longer than six months and yet not have "resided" there within the meaning of the statute; conversely, a person who did not actually live in the state for six months or even six days may still be eligible. That conclusion flows from the law established in Colorado, and in most states of the Union (see Appendix B, *infra*, p. 33), that "residence" for the purpose of voting eligibility means domicile. Judicial rulings and statutory provisions in Colorado follow the general rule that residence does not

require physical presence prior to or during the prescribed period but only the *establishment of state domicile prior to the commencement of that period.*

The Colorado Constitution (Article VII, Section 1) and the statute (49-3-1 (c), C.R.S. 1963) define a person as an eligible voter who "shall have resided in this state not less than one year next preceding the election at which he offers to vote." The landmark Colorado decision applying the domicile test to the requirement of residence for the prescribed term is the 1896 ruling in *Sharp* v. *McIntire*, 23 Colo. 99, 46 P. 115. In reading residence to mean domicile the Court relied on leading early precedents in Massachusetts (5 Metcalf 587 (1842)), Indiana (*French* v. *Lighty*, 9 Ind. 475 (1857)); Rhode Island (*State* v. *Aldrich*, 14 R.I. 171 (1883)); and particularly *Fry's Election Case*, 71 Pa. 302 (1872), which had definitively ruled that "when the Constitution declares that the elector must be a resident of the state for one year, it refers, beyond question, to the state as his home or domicile . . ."

Pursuant to the underlying rule, Colorado decisions hold that voting eligibility "residence" rests upon the intention of the voter to make his home in the state, manifested by some probative act of settlement there. *Jain* v. *Bossen*, 27 Colo. 423, 62 P. 194 (1900); *Kellner* v. *District Court*, 127 Colo. 320, 256 P. 2d 887 (1953). Mere absence from a domicile once established will not defeat the required "residence" if there is no intention to make the place of new abode permanent. *Grey* v. *Huntley*, 77 Colo. 478, 238 P. 53 (1925); *Bullington* v. *Grabow*, 88 Colo. 561, 298 P. 1059 (1931). Moreover, to meet the required residence for the prescribed period it is *not* necessary that the voter have been physically in residence in the state for that period, so long as his intention to make his home in Colorado was timely evidenced by such acts as the purchase of a home, the erection of a business, or the sale of his former home elsewhere. *Kellogg* v. *Hickman*, 12 Colo. 256, 264-266, 21 P.

325 (1888). Even a *single day* of physical presence in the jurisdiction before an election will suffice if the totality of evidence shows that the voter intended to establish domicile prior to the prescribed period. *People* v. *Chrysler,* 83 Colo. 355, 265 P. 92 (1928).

These principles have also been embodied in successive Colorado statutory provisions defining residence for purposes of voter eligibility, presently codified in 49-25-13, C.R.S. 1965. It is there specified that "in determining the residence of a person offering to vote", residence shall be where "his habitation is fixed, and to which, whenever he is absent, he has the intention of returning;" that no loss of residence arises by departure from the state "with an intention of returning;" and that the requisite Colorado residence is not gained by a person "retaining his home or domicile elsewhere." In like vein, section 49-13-4(4) prescribes that a voter challenged for failure to meet the prescribed residence period shall, in the event he was absent from the state during the year, certify under oath whether he intended to return while absent and whether he then continued to "regard this state as your home."

Nothing in the statute before the Court (49-24-1, C.R.S., 1963), which authorizes a person after six months' residence "to vote as a new resident for presidential and vice presidential electors," intimates any departure from the rule that residence means domicile. Accordingly, there remain fully applicable the provisions of section 49-25-13 prescribing a domicile test in determining the residence of a person offering to vote.[3]

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[3] Nor is there any legislative history of the uniform law upon which section 49-24-1 *et seq.* of the Colorado laws is patterned indicating that the drafters intended by residence to denote physical presence within the jurisdiction rather than domicile. See *infra* p. 18 n. 11. It is a fair inference therefore that the drafters did intend residence to denote domicile, consistent with the legislative provisions and judicial rulings in a great majority of the states. See *infra,* Appendix B.

In sum, it is clear that all the Colorado statute requires for eligibility to vote in a Presidential election is *that the voter have acquired his domicile in Colorado not less than six months before the election.* Had appellants, more than six months before the election, established their Colorado domicile by such acts as the purchase of a dwelling there and the sale of their home in California, the statute did not require their physical presence in Colorado for any pre-election period of time. Conversely, even if appellants had physically resided for six months or more in Colorado prior to the election they would not have met the prescribed residence requirement if they had kept their home in another jurisdiction and still intended to return thereto.

For constitutional purposes it is, of course, clear that a citizen "*can instantly transfer his citizenship from one State to another*", by "*actual residence in the place, with the intention that it is to be a principal and permanent residence.*" *Morris* v. *Gilmer* 129 U.S. 315, 328. See also *Sun Printing and Publishing Association* v. *Edwards* 194 U.S. 377; *Williamson* v. *Osenton* 232 U.S. 619. As emphasized in *Paudler* v. *Paudler,* 185 F. 2d 901, 902 (C.A. 5, 1950), *cert. denied,* 341 U.S. 920: "The Fourteenth Amendment of the Federal Constitution provides that, 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' We take it to be well established that plaintiff was at liberty to instantly transfer her citizenship from Texas to Arkansas and this she might do without necessity and simply from choice. She had a right to select her domicile for any reason that seemed sufficient to her." Thus the question before the Court is *not* whether Colorado may require the physical presence within its borders for six months prior to a Presidential election of one who desires to participate therein. Rather, it is whether the state may bar from participation in its Presidential Elector elections

those who established their state citizenship by acquiring domicile within the state less than six months prior to the election. We submit in the Argument that the Federal Constitution precludes a state from imposing on its bona fide domiciliaries such arbitrary restrictions as a waiting period after acquisition of their state citizenship in order to participate in a Presidential Elector election.

ARGUMENT

I. Only a Paramount Colorado Interest Could Justify Denial to its Genuine Domiciliary-Citizen of the Ballot in a Presidential Elector Election.

In measuring the constitutional validity of state laws governing the franchise, members of this Court have differed sharply concerning the governing standard. On the one hand it seems clear under this Court's recent majority rulings in voting cases, particularly *Williams* v. *Rhodes*, 393 U.S. 23, and *Kramer* v. *Union Free School District*, 89 S.Ct. 1886, that it is the state's burden to justify by a "compelling state interest" any dilution or denial of the fundamental right of the franchise. On the other hand, the concurring opinions of Mr. Justice Harlan in *Williams*[4] and Mr. Justice Stewart in *Shapiro* v. *Thompson*, 89 S. Ct. at 1335, and the dissenting opinion of three justices in *Kramer*, reject so strict a standard and suggest that the state must show compelling grounds only when a challenged

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[4] As stated in Mr. Justice Harlan's more recent dissenting opinion in *Shapiro* v. *Thompson*, 89 S. Ct. 1322, 1344-45:

> "when as in *Williams* v. *Rhodes*, *supra*, and the present case, a classification is based upon the exercise of rights guaranteed against state infringement by the federal Constitution, then there is no need for any resort to the Equal Protection Clause; in such instances, this Court may properly and straightforwardly invalidate any undue burden upon those rights under the Fourteenth Amendment's Due Process Clause. See, *e.g.*, my concurring opinion in *Williams* v. *Rhodes*, *supra*, at 41."

law impairs a specific privilege protected by the Federal Constitution. When it comes to Presidential Elector elections, participation therein is in fact a federal privilege, but the issue is complicated by the circumstance that Article II leaves voter eligibility matters within the state's general authority to determine the means by which its Presidential Electors are chosen. Yet the state's jurisdiction to determine the choice of Presidential Electors must still be exercised in conformity with other constitutional strictures, and will fail when, as in *Williams*, the state unreasonably restricts citizen participation in the election.

For present purposes, however, it is not necessary to resolve the doctrinal difference reflected in the several opinions in *Williams* and *Kramer*. For here the question involves a state law *directly disenfranchising citizens from participation in a general election of Presidential Electors*. As we demonstrate below, such a statute can be justified only by a paramount state interest, both because, (i), the right to participate in a Presidential Elector election is exercised under Article II of the Constitution and protected by the Supremacy Clause from undue state curtailment, and because, (ii), what is at stake is the right to participate in an election of public officials which this Court's decisions have elevated to the highest standing under the Fourteenth Amendment:

(i) Members of Congress and the President and Vice President hold offices established under the Federal Constitution, and the manner of their election is specifically prescribed in Articles I and II and the Twelfth and Seventeenth Amendments. While the Constitution chiefly entrusts to the states the function of conducting such federal elections and prescribing qualifications for participation therein, nevertheless participation is a right directly protected by the Federal Constitution. As emphasized in

Twining v. *New Jersey*, 211 U.S. 78, 97: "*among the rights and privileges of National citizenship recognized by this court are . . . : the right to vote for National officers.*" That proposition has been established law since *Ex parte Yarbrough*, 110 U.S. 651, where this Court upheld the validity of an indictment under a federal statute which protected both Congressional and Presidential elections from interference and corruption. See *Wiley* v. *Sinkler*, 179 U.S. 58; *Swafford* v. *Templeton*, 185 U.S. 487; *United States* v. *Mosley*, 238 U.S. 383; *United States* v. *Classic*, 313 U.S. 299; *Smith* v. *Allwright*, 321 U.S. 649; *United States* v. *Saylor*, 322 U.S. 385.

Nor, as concerns the federal nature of the privilege, does any distinction arise between Congressional elections which are specified by Article I, and Presidential Elector elections which under Article II states might forego for some other method of choosing their Electors.[5] Constitutional norms governing rights of election participation are not rendered inapplicable "simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment." *Kramer* v. *Union Free School District*, 89 S. Ct. 1886, 1890. Once the state has opted for popular election of Presidential Electors it is clear that participation in such an election is a privilege exercised under the Federal Constitution.[6] Presidential Electors perform federal functions under the Federal Constitution. On

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[5] Possibly after the Fourteenth Amendment states may no longer dispense with popular election of Presidential Electors. The Fourteenth Amendment imposes restrictions on states—in its privileges and immunities, due process, and equal protection strictures—which may have reduced the previous ambit of state authority to select Presidential Electors by a process which does not give voice and vote to the citizens of the state. Cf. *Harper* v. *Virginia Board of Elections*, 383 U.S. 663; *Williams* v. *Rhodes*, 393 U.S. 23; *Kramer* v. *Union Free School District*, 89 S.Ct. 1886; but see *McPherson* v. *Blacker*, 146 U.S. 1.

[6] This Court held in *United States* v. *Classic*, 313 U.S. 299, that the right of participation in Congressional elections extends to primaries con-

that premise, in *Burroughs* v. *United States*, 290 U.S. 534, 545, this Court upheld the Constitutional power of Congress to safeguard participation in Presidential Elector elections:

> "In *Ex parte Yarbrough*, 110 U.S. 651, this court sustained the validiy of § 5508 of the Revised Statutes, which denounced as an offense a conspiracy to interfere in certain specified ways with any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States; and of § 5520, which denounced as an offense any conspiracy to prevent by force, etc., any citizen lawfully entitled to vote from giving his support, etc., toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of Congress. The indictments there under consideration charged Yarbrough and others with conspiracies in violation of these sections. The court held, against the contention of the accused, that both sections were constitutional. It is true that, while section 5520 includes interferences with persons in giving their support to the election of presidential and vice presidential electors, the indictments related only to the election of a member of Congress. The court in its opinion, however, made no distinction between the two, and the principles announced, as well as the language employed, are broad enough to include the former as well as the latter . . ."

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ducted under state law, although they are nowhere mentioned in the Constitution. The Court conceded (at p. 316) "that the framers of the Constitution . . . did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary . . .", but found the protections of the Constitution applicable because the *function* of the primary was selection of federal officers. No less than in *Classic*, although popular election of Presidential Electors may not be constitutionally required, once the state has chosen that method, the existence of a federal right of citizen participation flows from the reality that the ultimate function of the election is the selection of the President of the United States.

Clearly, then, where a state provides for popular election of Presidential Electors, this Court's decisions support the proposition that the privilege of participation in such elections is one exercised under Article II of the Federal Constitution and protected by the Supremacy Clause. Cf. *Wesberry* v. *Sanders*, 376 U.S. 1. Accordingly, under the principle recently applied in *Shapiro* v. *Thompson*, 89 S. Ct. 1322 and *Williams* v. *Rhodes*, 393 U.S. 23, the state has a heavy burden to justify denial or curtailment of a right protected by the Constitution. As emphasized in the concurring opinion of Mr. Justice Harlan in *Williams*, the Constitution forbids the state to impose any undue burden on the exercise of a federal right, including the right to participate in "the process by which Presidential Electors are selected" 393 U.S. at 42.[7]

(ii) Even if the right to participate in a Presidential Elector election were not regarded as protected by Article II, the strict standard of review would remain applicable in the present case. For when it comes to the high right of political participation through exercise of the franchise, under the Fourteenth Amendment only a compelling interest will justify any state curtailment. That principle has been

[7] In addition to participation in a Presidential Elector election, which the Colorado statute's waiting period directly invades, the statute indirectly invades another Constitutional privilege. That is the "right to travel", whose restriction by a welfare waiting period this Court found unconstitutional under the "compelling interest" test in *Shapiro* v. *Thomson*, *supra*. As the Court there ruled (89 S.Ct. at 1331): "in moving from State to State . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." Just as in *Shapiro*, appellants in the present case exercised the constitutional right to move—from California to Colorado. And in view of the curtailment of that right by a waiting period before those who have recently become domiciliaries of the state are eligible for the full benefits of state citizenship, the presently challenged statute can be justified only by a compelling governmental interest.

emphatically espoused by this Court, most recently in *Kramer* v. *Union Free School District*, 89 S. Ct. 1886, 1889-1890:

> "'[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.' *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). See *Williams* v. *Rhodes*, *supra*, at 31; *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964). This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society . . .
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> "Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. See *Carrington* v. *Rash*, [380 U.S. 89,] 96.
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> "And for these reasons, the deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections."

Within the precise terms of the rule stated in *Kramer*, this is a case where the statute "grants the right to vote to some

bona fide residents of requisite age and citizenship and denies the franchise to others", invoking need for determination "whether the exclusions are necessary to promote a compelling state interest".[8]

* * * * *

In sum, it appears that a substantial majority of this Court holds to the view that a heavy burden of justification for denial of participation in elections falls upon the state, particularly where what is involved is a Presidential election. Whether viewed as a privilege directly protected under Article II of the Constitution or merely as a right secured from arbitrary state intrusion by the equal protection requirement, the central and controlling proposition in the present case appears beyond dispute: The right to participate in a state's election of Presidential Electors is one which under the Constitution the state may not lightly curtail, and which will be justified only by a paramount state interest. In the succeeding discussion we demonstrate that no such state interest underlies the waiting period imposed on new citizens of Colorado for eligibility to participate in a Presidential Elector election.

II. No Tangible State Interest Supports Imposing on Bona Fide New Citizens of Colorado a Waiting Period For Eligibility to Participate in a Presidential Election.

As we have demonstrated in the foregoing point it is the

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[8] We recognize that the dissenting opinion in *Kramer* rejected general applicability of the compelling interest standard to every case of voter disenfranchisement. But we deem it noteworthy that among those participating in the dissent were Mr. Justice Harlan, who concurred in the applicability of the strict standard to a Presidential Elector election in the *Williams* case (see *supra*, p. 8, n. 4), and Mr. Justice Stewart, who indicated in his dissenting opinion in *Williams* (n. 5 at p. 52) that in cases involving "direct popular election of candidates to state or federal office," curtailment of individual voting rights may fall even under the invidious discrimination test.

constitutional burden of the state to justify the statute presently before the Court by a paramount governmental interest. We have also demonstrated in the Statement, *supra*, pp. 4-8, that what the Colorado statute does is simply to impose a waiting period upon bona fide domiciliaries of the state between their acquisition of state citizenship and the exercise of the Presidential franchise. We have underscored the fact that the Colorado "residence" rule *does not require physical presence but only domicile*, so that the statutory waiting period is actually a length-of-citizenship requirement for exercise of the Presidential franchise. There is thus not presented here any question concerning a state's power to require the physical presence of a person within its borders for any period before voting.

Nor is there any question here concerning a possible state interest to make a period of physical presence the test of the *genuineness of domicile*. A state might conceivably impose a period of actual habitation to measure genuineness of domicile for voting purposes, but Colorado has not done so. On the contrary, Colorado and most other states emphasize by judicial decision and legislation that domicile is a function of the intent of the citizen manifested by some act of settlement within the jurisdiction, and length of presence within the state is not determinative *either* for or against the existence of domicile. A somewhat more difficult question might be posed by a statute testing domicile by length of residence within the state, but it is not presented in this case.[9]

[9] A case which does appear to have been premised upon state power to require for voting eligibility physical presence rather than domicile is *Drueding* v. *Devlin*, 234 F. Supp. 721 (D. Md. 1964) aff'd 380 U. S. 125. While Maryland follows the usual rule that voting residence means domicile rather than physical presence (see *Gallagher* v. *Board of Elections*, 219 Md. 192, 148 A. 2d 390 (1959) and cases cited), that fact was not brought to the attention either of the District Court or this Court. Referring to the fact (234 F. Supp. at p. 723) that plaintiffs "will not have lived in Maryland for one year" before the election, the District Court's opinion appears to have assumed that one year's residence under the Maryland law means

What is presented for resolution, as we have stated, is simply a statute which requires that *after* the acquisition of bona fide domicile and thus citizenship in Colorado, a person must wait for a stipulated period before participating in a Presidential election. We proceed to a demonstration that no tangible state interest supports any waiting period imposed on new citizens of the state for eligibility to participate in a Presidential Elector election.

In our view the controlling consideration on the pending question is not the length of the particular waiting period imposed, but the absence of a tangible governmental interest supporting *any* waiting period for citizen-domiciliaries before participation in Presidential elections. So long as the citizen proves his domicile in Colorado prior to the close of registration shortly before the election, we submit there is no state interest whatever also to impose an eligibility period. Accordingly, we do not deem the Constitutional outcome to hinge upon whether the waiting period for participation in a Presidential Elector election is one year (as it was in Colorado before 1963), six months (the statute now before the Court), or two months (as it is under a 1969 amendment of the Colorado law (House Bill 1214)).[10]

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physical presence. Of course, where domicile is not as such required, a state has an understandable interest to require a minimum period of actual habitation within its borders to assure that only persons with some state attachment exercise the franchise. We would, however, suggest that even in such a case the opening sentence of the 14th Amendment—bestowing state citizenship on persons "*in the State wherein they reside*"—contemplates domicile as the test of state citizenship (see *supra*, p. 7) and precludes state adoption of an arbitrary period of physical presence as the controlling standard. Compare *Schneider* v. *Rusk*, 377 U.S. 163.

[10] Since what is critical is not the length of the period but the absence of justification for imposing upon bona fide state citizens *any waiting period at all*, nothing in the recent reduction of the Colorado waiting period moots the ultimate Constitutional objection presently before the Court.

(i) *Fraudulent Claim of State Citizenship.* The District Court in the case at bar postulated that the six month waiting period serves to prevent fraudulent voting and thereby preserves the purity of elections (292 F. Supp. 610, 614 (1968)). But an entirely different means is employed by the state for that purpose; prevention of fraudulent voting is the principal function of the system of voter registration. To vote in Colorado, a person must register not later than the twentieth day before a primary or general election (49-4-2, C.R.S., 1965; 49-24-2, C.R.S., 1963). At such registration he affirms under oath his eligibility to vote and gives the necessary information to test his eligibility. Prior to the election governmental officials, political parties, and private persons may scrutinize the poll books for the purpose of assuring voter eligibility. Colorado has thus decided that the mechanism of registration before the election and possible challenge of voters on election day (49-13-2, C.R.S., 1965) provides the safeguard against voting by persons ineligible for one or another reason, including lack of requisite Colorado domicile.

In contrast to that registration process, the waiting period for voting by new citizens of Colorado is totally unrelated to the prevention of voting fraud. The requirement that all voters have become domiciliaries at least six months prior to the Presidential election adds nothing by way of substantive or procedural assurance to the prevention of fraudulent voting. One whose claim of domicile is false can make that claim with equal cogency, or lack thereof, whether the alleged date of acquisition be six years or six hours before registration closes. And as concerns procedure, even under the present eligibility waiting period the voter may still register shortly before the election, so that the eligibility waiting period adds no time for the *verification* of eligibility. Thus, in the remote circumstance

that domiciliaries of other states should attempt to make false voting claims in Colorado, they are in no way inhibited by the eligibility waiting period.[11]

(ii) *Double voting.* Assuming that a new citizen is qualified to vote in Colorado, is there a danger that unless a waiting period is imposed he will continue to exercise his franchise in the previous state of residence? Whatever may be the magnitude of the double voting danger, it is clear that Colorado's waiting period can in no way serve to lessen it. Whether a voter must wait a year, or six months, or not at all when he begins to vote in Colorado, he may still seek to continue to cast a fraudulent vote in his former state of domicile. While the Colorado waiting period thus totally fails to prevent double voting, a Uniform Act provision does provide a system of notice to a former state upon the voter's application for a ballot in a new state.[12] Plainly, the danger of double voting cannot justify the waiting period here in issue.

(iii) *Knowledge of Local Candidates.* The District Court also postulated a state purpose of ensuring voting by members of the community with interest in and knowledge of Colorado issues and candidates (292 F. Supp. at 614). But since what the statute requires is not presence in Colo-

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[11] That a waiting period is unneeded for the prevention of voting fraud is indicated by its complete abolition in eight states in accordance with the recommendation of the Uniform Act for Voting by New Residents in Presidential Elections (Handbook of the National Conference of Commissioners on Uniform State Laws, pp. 261-70 (1962)). These states are Alaska (Stat. § 15.05.012 (1968 Supp.)); Michigan (Const. Art. 2 § 3 (1963) (no implementing statute)); Nebraska (R.R.S. 1943 § 32-1301 (1968)); North Dakota (N.D.C.C. § 16-16-17 (1967 Supp.)); Ohio (Rev. Code. Ann. § 3504.01 (1960)); Oklahoma (12 O.S. Supp. 1967 § 602); Oregon (Rev. Stat. § 247.410 (1967)); and Wisconsin (W.S.A. 6.15 (1969)). Presumably these states have not been inundated by ineligible non-residents determined at the risk of prosecution to cast their Presidential vote therein rather than their true state of domicile.

[12] Section 3, Handbook, *supra*, n. 11 at 266.

rado but only domicile, the requirement that it have been established at a given point in time is no assurance of familiarity with candidates. In any event, appellants seek to vote in a Presidential Election, where such localism has no application. As the Attorney General of the United States recently testified:

> "A residency requirement may be reasonable for local elections to insure that the new resident has sufficient time to familiarize himself with local issues. But such requirements have no relevance to Presidential elections because the issues tend to be nationwide in scope and receive nationwide dissemination by the communications media. The President is the representative of all the people and all the people should have a reasonable opportunity to vote for him." [13]

Thus neither prevention of fraudulent or double voting nor familiarity with local matters constitute tangible state interests serving to validate this statute. These make-weight points cannot possibly constitute a paramount or compelling state interest to disenfranchise new citizens of Colorado. Indeed, the absence of any tangible safeguard flowing from the waiting period imposed is underlined by the fact that a direct and immediate test of domicile applies in Colorado in its imposition of taxes on bona fide citizens of the State. The arbitrary nature of the waiting period for exercise of the franchise imposed on new citizens of Colorado is underscored by the fact that no such periods apply to the major burdens of state citizenship. The three principal duties imposed by Colorado upon domiciliaries are the

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[13] Statement of Attorney General John N. Mitchell before Sub-committee No. 5 of the House Judiciary Committee on H.R. 4249, p. 16 (June 26, 1969). See also 115 Cong. Rec. S5177 (daily ed., May 14, 1969); Schmidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 Mich. L. Rev. 823, 828 (1963).

inheritance tax (138-3, C.R.S., 1963), the gift tax (138-4, C.R.S., 1963) and the income tax (138-1, C.R.S., 1963). As in the case of the voting provisions, the controlling statutory term for tax purposes is "resident" and again it means domiciliary. See *People ex rel Rogers* v. *Estate of Waterman*, 108 Colo. 263, 116 P. 2d 204 (1941).[14]

The income tax, for instance, is imposed upon every resident individual defined to include "a natural person who is domiciled in this state" (138-1-2, C.R.S., 1965). The inheritance tax specifically applies to a person who upon his death "shall have been a citizen of Colorado, sojourning outside of this state", and attaches a presumption of domiciliary status to one who declared himself to be a resident or citizen in his last will, *"whether or not such person may or may not have voted or have been entitled to vote . . . in this state"* (138-3-5, C.R.S., 1963, italics supplied). With respect to all three taxes upon domiciliaries, they may be avoided upon issuance of a "certificate of non-residence" for one who proves his Colorado residence to be merely temporary and shows his domicile elsewhere. See 138-1-76 *et seq.*, C.R.S., 1965. Proof of such domicile elsewhere requires showing a permanent place of abode and voting eligibility outside Colorado (138-1-78, C.R.S., 1965).

These provisions make clear that the signal burdens of state citizenship—inheritance, gift, and income taxes—are all applicable to Colorado domiciliaries immediately upon acquisition of their state domicile. When it comes to the payment of taxes the state applies no waiting period; the new Colorado citizen is immediately subject to the burdens

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[14] Colorado is illustrative of numerous other states which impose tax burdens on presons immediately upon their acquisition of domiciliary status. See, e.g., Arizona (A.R.S. § 43-101(p) (1956)); California (Rev. & Tax C.A. § 17014 (1956)); Massachusetts (2A Mass. 1968 Supp. C.62 § 61 (e)); Oklahoma (68 Okl. St. Ann. § 2302 (j) (1966)); Tennessee (Code Ann. § 67-2601 (1955); Wisconsin (Stat. § 71.01 (1967)).

of citizenship while still denied the privilege of the franchise where the prescribed waiting period has not elapsed.

We do not, of course, mean to suggest that the Fourteenth Amendment imposes any inexorable "no taxation without representation" rule. But we do suggest that a state has an extra burden to justify imposition of voting waiting periods on its new citizens when it vests upon them the full burdens of state citizenship without any delay. As we have demonstrated, Colorado falls far short of meeting any reasonable burdens of justification for its Presidential-election eligibility waiting period. The double standard which Colorado attaches as between the privilege of the franchise and the burdens of taxation adds the ultimate insult to the Constitutional injury exposed in the present case.

III. Widespread Disenfranchisement Under Existing Voting Residence Laws Calls for Recognition of the State's Constitutional Duty to Afford all its Qualified Citizens full Opportunity for Participation in Presidential Elector Elections Irrespective of the Length or Place of Their Residence or Sojourn.

Under the established constitutional standard the absence of any paramount state interest supporting the Colorado waiting period presently before the Court should be dispositive of the narrow question at bar. But since this case is the first to present frontally the question of state power to restrict the popular franchise in Presidential Elector elections, the Court may desire to elaborate a general constitutional standard applicable to state restriction of the Presidential franchise. Some guidelines in that area are very much in order in view of the fact that existing state voter residence laws are a welter of confusion and inconsistency which effectively deny the Presidential ballot to millions of bona fide citizens.

Thus, the waiting period now before the Court is but one of the residence provisions which unreasonably restrict the Presidential franchise. Many states have not yet recognized the special nature of Presidential elections and simply apply the onerous length-of-domicile requirements applicable to state and local elections. As a consequence of the various waiting periods imposed upon bona fide state citizens for participation in elections, 5.5 million persons were denied the right to vote for the President of the United States in the 1968 elections merely because they moved their domicile from one state to another in the months preceding the national election.[15]

Numerous citizens living or traveling abroad during the election year are similarly denied the Presidential franchise under existing state voting laws. As we have emphasized, *supra*, pp. 2-3, a great majority of the states in one fashion or another deny the vote to such citizens—at best the state law recognizes the voting needs of the citizen abroad on election day but fails to provide a workable system to fill the need; at worst state statutes simply fail to provide absentee voting or registration, and some completely bar those not physically present or residing in the state.

Whatever may be said in defense of a particular legislative scheme, an overview of the situation in all fifty states shows that there has been no general effort by states to assure their qualified citizens opportunity to participate in Presidential elections. The authors of the Constitution committed to the tender mercies of state legislatures the method for selection of Presidential Electors and public election has become the accepted method, but vast numbers of qualified voters are excluded from such elections simply because their state citizenship was recently acquired or because they are traveling or residing outside the state of

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[15] Statement of Attorney General Mitchell, *supra*, p. 19.

their citizenship. So widespread a default upon state obligations fairly implied from Article II of the Constitution requires more than piecemeal relief. What is required is announcement of a Constitutional standard imposing upon the state the duty to make available to all its bona fide and qualified citizens full and fair opportunity to participate in its Presidential Elector elections regardless of the length or place of their sojourn.

Such a duty, we submit, would comport with the understanding of the Founding Fathers. True, they left to the state legislature's discretion the means by which Presidential Electors were to be chosen and conceivably Electors might still be selected by appointment rather than the popular franchise, Cf. *supra*, p. 10, n. 5. But it is the high constitutional function of the Electors to choose the President of the United States, and once popular election is used as the method of selection then an *unrepresentative election* of those who will choose the President of the United States is more than Article II will tolerate.[16] The historic reapportionment rulings of this Court rest on the premise that arbitrary curtailment of voters' rights is antithetical to the very concept of popular election. See *Reynolds* v. *Sims*, 377 U.S. 533, 562. Where the Electors who choose the highest officer in the land are to be elected by popular franchise, it seems axiomatic that Article II precludes discriminatory restrictions, imposition of a poll tax, a length-of-domicile waiting period, or any other provision denying competent adult citizens the Presidential franchise. Whether the disenfranchisement results from a

[16] Even this Court's landmark ruling upholding the wide ambit of state discretion under Art. II, Section 1, assumed the egalitarian norm as applicable. As the Court stated in *McPherson* v. *Blacker*, 146 U.S. 1, 40: "If presidential electors . . . are elected in districts where each citizen has an equal right to vote the same as any other citizen has, no discrimination is made." Cf. Concurring opinion of Mr. Justice Harlan in *Williams* v. *Rhodes*, 393 U.S. at 42-43.

state restricting the vote or simply from the failure of the state to make the ballot available should make no constitutional difference. State inconvenience is no excuse, for it is the duty of the state legislature to exercise its power under Article II in such manner that Presidential Electors are chosen in a fair and representative fashion.

As we approach the 200th anniversary of the Republic it is high time for recognition of the state's constitutional duty to enfranchise all its qualified citizens in Presidential elections. This Court's affirmation of such a constitutional duty would be decisive both on the narrow question now before the Court and on the variety of state voting laws disenfranchising citizens traveling or residing abroad. Clearly, the duty to afford the federal franchise to qualified citizens is violated by the statutes which require the domiciliary to be present at the election or to maintain a home within the state (see *supra*, p. 2).[17] Equally clearly, the state has not met its duty of enfranchisement (see *supra*, p. 3) where burdens of proof of domicile are so onerous upon the voter, or the form of oath concerning domicile is so misleading, as to discourage bona fide domiciliaries from absentee voting or registration.

Finally, the state's enfranchising obligation is equally violated where the lack of absentee voting or registration machinery has the effect of denying the ballot to the citizen who cannot be present at the time of the registration or

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[17] In effect such statutes treat as an automatic relinquishment of state citizenship the taking up of residence outside the state. So harsh a rule may invoke the principle applied to the forced surrender of national citizenship in *Schneider* v. *Rusk*, 377 U.S. 163. There, in striking down as arbitrary, an automatic forfeiture of citizenship from a period of residence abroad, this Court emphasized that "A native-born citizen is free to reside abroad indefinitely without loss of citizenship. . . . Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons." (377 U.S. at 168, 169).

election (see *supra*, p. 3). We live, after all, in a mobile society wherein it is common knowledge that citizens are required for business or personal reasons to be absent from the state for frequent and even extensive periods. In view of that reality of Twentieth Century life, state failure to provide absentee voting and registration has too obvious a disenfranchising impact to survive under some purported distinction between legislative nonfeasance and misfeasance. Whatever may be the rule with respect to local elections, when it comes to electing the President of the United States it is the clear Constitutional obligation of the state to refrain from disenfranchising its absent domiciliaries either by legislative disqualification or failure to make the ballot reasonably available. We urge that this Court declare in clear terms the obligation of the state to make participation in its Presidential Elector elections available to all qualified citizens of the state irrespective of the length or place of their residence or sojourn.

Conclusion

For the foregoing reasons it is urged that the Court should reverse the ruling below.

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APPENDIX A

Forty-two states and the District of Columbia effectively disenfranchise or impair the ability of nonresident domiciliaries to vote. Illinois, Louisiana, and New York require a voter's actual presence or maintenance of a home in the state, thereby rendering overseas domiciliaries ineligible. Ohio allows temporary absentees to vote for three years but no longer. Fourteen states appear to recognize the voting eligibility of nonresident domiciliaries but have statutes, decisions or an Attorney General's Opinion which raise doubts regarding that eligibility. Eleven states require the execution of absentee registration or voting forms which confuse voters by requiring a state "residence," thereby inducing nonresident domiciliaries to forego the franchise for fear of perjuring themselves. Finally, twenty-three states disenfranchise these voters by failing to provide absentee registration, absentee ballots, or sufficient time in which to cast an absentee ballot.[18]

1. The following 3 states require physical presence or the maintenance of a home within the state in order to vote:

State	*Authority*
Illinois	*Stein* v. *County Board of School Trustees*, 85 Ill. App. 2d 251, 229 N.E. 2d 165 (1967); *Clark* v. *Quick*, 337 Ill. 424, 36 N.E. 2d 563 (1941)
Louisiana	*Estopinal* v. *Michel*, 121 La. 879, 46 So. 907,908 (1908); Opin. Att'y Gen. to Bipartisan Committee (July 29, 1966): "The place where one *regards* as his home is unimportant; where he actually resides is the determining factor."
New York	Letter from Secretary of State to Office of Information, Department of Defense (May 27, 1969): " . . . for a civilian to vote by absentee ballot he must retain a permanent residence within the State of New York [unless voter is employed by the United States]"

[18] The sub-totals add up to more than 42 states and the District of Columbia because several states fit into more than one category.

Ohio permits a voter to retain his eligibility to vote while absent from his home "for temporary purposes." However, "temporary purposes" is defined as "a period of absence not in excess of 3 years." (Ohio Rev. Code Ann. §3503.02 (1960))

2. Fourteen states appear to recognize the voting eligibility of nonresident domiciliaries but have statutes, decisions, or the opinion of an Attorney General which raise doubts regarding that eligibility. Thirteen of those states have a statute or decision approximately as follows: "If a person removes to another state as a place of permanent residence, with the intention of remaining for an indefinite time, he loses his residence in this state, notwithstanding that he entertains an intention of returning at some future period."

State	*Authority*
Arizona	A.R.S. §16-925 (1956)
California	West's Ann. Elec. Code §14287 (1961)
Delaware	Del. Code Ann. 15 §4947 (Supp. 1968)
Indiana	Ann. Ind. Stat. §29-4803 (1969)
Kentucky	K.R.S. Ann. 117.610 (1963)
Minnesota	M.S.A. §201.26 (1962)
Montana	Rev. Code of Mont. 1947 §23-522 (1967)
Nebraska	R.R.S. 1943 §32-475 (1968)
Nevada	NRS 293.500 (1967)
New Hampshire	*Felker* v. *Henderson*, 78 N.Hamp. 509, 102 A. 623, 624 (1917)
North Carolina	Gen'l. Stat. N. Car. §163-57 (Supp. 1967)
Pennsylvania	25 P.S. §2814 (1963)
Utah	Utah Code Ann. 20-2-14 (1969)

Although New Jersey's decisional law (see Appendix B) indicates that residence equals domicile for voting purposes, the Attorney General of the State of New Jersey wrote to the Bipartisan Committee on May 11, 1966, as follows: " . . . in order to have a voting residence in this State it is necessary that a person possess an intention to make this State his home for an indefinite period and, in addition, he must have a residence to which he is entitled to return at

will. For instance, if a person rents an apartment and subsequently leaves the State, and that person no longer has a fixed address in New Jersey, he is not a domiciliary who is entitled to vote irrespective of his intentions."

3. Eleven states require the execution of absentee registration or voting forms which confuse voters by requiring a state "residence", thereby inducing nonresident domiciliaries to forego the franchise for fear of perjuring themselves:

State	*Form*
Arizona	A.R.S. §16-143(B) (Supp. 1968) (Absentee Registration): "My place of residence is ——— precinct, ——— street, city of ———, county of ———, state of Arizona" §16-143(A) (Supp. 1968) describes the required residence as "actual place of residence."
Colorado	49-4-17 C.R.S., 1965 (Absentee Registration): "I . . . shall have resided in the state of Colorado at least twelve months, in the county of——— at least ninety days, and in precinct ——— at least twenty days before the election."
Hawaii	Haw. Rev. Stat. §11-4 (1968) (Absentee Registration): "8. I have resided in the State of Hawaii not less than one year and in the ——— representative district not less than three months, immediately preceding this date on which I now offer to register. . . . 10. The residence stated in item 8 of this affidavit is not simply because of my presence in Hawaii but has been acquired with the intent to make Hawaii my legal residence . . ."
Idaho	Idaho Code §34-807 (1963) (Absentee

	Registration): "I do swear . . . that I have . . . actually resided in this state for six months, and in this county for thirty days next preceding the next ensuing _____ election . . ."
Minnesota	M.S.A. 207.19 (Supp. 1969) (Absentee Ballot): "His home and place of residence is and on said election days will be at _____ in the _____ of _____ (Town, City or Village) County of _____ State of Minnesota."
South Dakota	S.D.C.L. 1967 §12-4-7 (Absentee Registration): ". . . I reside in the _____ precinct in the city of _____, at _____ street number, _____ street (or town, or _____ township), and in the _____ independent school district, in _____ county; . . ."
Tennessee	Tenn. Code Ann. §2-1604 (Supp. 1968) (Absentee Ballot): "I _____ hereby declare that my fixed residence is _____ (street address) (city or town) _____, Tennessee;" (county)
Vermont	17 V.S.A. §126 (1968) (Absentee Ballot): "State of Vermont County of _____ . . . I am a resident, a citizen and a legal voter of the town (city) of _____; county of _____."
West Virginia	W.Va. Code Ann. §3-3-3 (Supp. 1968) (Absentee Ballot): "I, _____, hereby declare that I am now, or will have been, a resident of the State of West Virginia for twelve

months, and of the county of _____ for sixty days next preceding the date of the ensuing election to be held on the _____ day of _____, 19____; that I am now a resident of election precinct No. _____ . . . Home address of applicant _____ P. O. address to which ballot is to be sent _____"

Wisconsin — W.S.A. 6.87 (Supp. 1969) (Absentee Ballot) ". . . I am a resident of the _____ precinct of the (town) (village) of _____, or of the _____ ward in the city of _____, residing at _____ in said city, the county of _____, state of Wisconsin, . . ."

Wyoming — Wyo. Stat. §22-158 (1959) (Absentee Registration): "I do solemnly swear . . . that I will have actually and not constructively been a bona fide resident of [Wyoming] one year and of said county sixty days, and of election district No. _____ in said county ten days preceding the next election; that I am an actual resident of ward No. _____ . . . that my address is _____ (within) (not within) the limits of an incorporated city or town . . ."

4. Twenty-four states do not provide the civilian overseas voter with absentee registration, absentee ballot, or sufficient time to cast an absentee ballot:

(a) Absentee Ballot:

Alabama — Title 17 §64(16)(23)(Supp. 1967); Title 17 §64(24) (1958 Code Recomp.)

Michigan — M.C.L.A. §168.758 (1967)

Mississippi — Miss. Code §3196-01 (1957); §3203-11 (Supp. 1968)

South Carolina	Cf. S.Car. Code Law §23-441 *et seq.*, 23-449.31 *et seq.* (Supp. 1968)

(b) Absentee Registration

Alabama	Title 17 §26 (Supp. 1967)
Arkansas	Ark. Const. Amendment 51 (Supp. 1967)
Connecticut	Conn. Gen'l. Stat. Ann. §9-20 (Supp. 1969); §9-26 (Supp. 1969)
Delaware	Del. Code Ann. 15 §1722 (Supp. 1968); cf. 15 §1901 *et seq.*
District of Columbia	D.C. Code §1-1107 (1967)
Florida	F.S.A. §98.501 (Supp. 1969)
Louisiana	LSA-R.S. 18:40 (1969)
Maine	21 M.R.S.A. §71 (1965)
Maryland	Ann Code of Md. Art. 33 §§3-1, 3-2, 3-7 (Supp. 1968)
Massachusetts	M.G.L.A. 51 §42 (Supp. 1969)
Mississippi	Miss. Code §3196-06 (1957)
Missouri	V.A.M.S. §113.240 (Supp. 1968); cf. 112.310 1966
Montana	Rev. Code of Mont. 1947 §23-503 (1967)
Nevada	NRS 293.517; cf. 293.553 (1967)
New Jersey	N.J.S.A. 19:31-6 (1964)
North Carolina	Gen'l. Stat. N.Car. §§163-67, 163-68 (Supp. 1967); cf. §163-245 *et seq.*, (Supp. 1967)
Ohio	Ohio Rev. Code Ann. §3503.11 (Supp. 1968); §3503.27 (1960)
Oklahoma	26 Okl. St. Ann. §93.4 (Supp. 1968); cf. 26 Okl. St. Ann. §345.1 (Supp. 1968)
Pennsylvania	25 P.S. §951-18 (1963); cf. 25 P.S. §§951-18.1, 951-18.2 (Supp. 1969)
Rhode Island	Gen'l. Laws of R.I. §17-9-7 (Supp. 1966); cf. §§17-9-10, 17-9-11, 17-9-25 (Supp. 1966)
South Carolina	S.Car. Code Law §23-63 (Supp.

	1968); cf. §23-441 *et seq.* (Supp. 1968)
Virginia	Code of Va. Ann. 1950 §24-68; cf. 24-345.1 *et seq.* (1969 replacement)

(c) A nonresident domiciliary of Iowa living overseas is required to apply for an absentee ballot no sooner than 20 days prior to the election (Iowa Code Ann. §53.2 (Supp. 1969)). Within these twenty days prior to the election the absentee ballot must also be sent to the voter, the ballot must be voted and must be returned to the election official prior to the election (Iowa Code Ann. §53.17 (1949)).

APPENDIX B

The term "residence" for the purpose of voting eligibility means "domicile" in 46 states. Illinois and Louisiana do not equate the terms for voting purposes and the law of Hawaii, Nevada and the District of Columbia is unclear on the matter. However, as Appendix A demonstrates, the vast majority of state domiciliaries living abroad are nevertheless effectively disenfranchised.

1. The 46 states are:

State	*Authority*
Alabama	Code Ala. 17§17 (1958)
Alaska	Alas. Stat. §15.05.020 (Supp. 1968)
Arizona	A.R.S. §16-925 (1956)
Arkansas	*Wilson* v. *Luck*, 201 Ark. 594, 602, 146 S.W. 2d 696 (1941)
California	West's Ann. Elec. Code §14282 (1961)
Colorado	45-25-13 C.R.S., 1965; *Sharp* v. *McIntire*, 23 Colo. 99, 46 P. 115 (1896)
Connecticut	9 Op. Att. Gen. 138 (1916)
Delaware	*State* v. *Frest*, 4 Del. 558 (1847)
Florida	1953-54 Op. Att'y Gen. 75
Georgia	Ga. Code Ann. §34-103 (aa) (Supp. 1968)
Idaho	Idaho Code §34-1021 (Supp. 1967)
Indiana	*Yonkey* v. *Cornelson*, 27 Ind. 236, 245 (1866); *Maddox* v. *State*, 32 Ind. 111, 112 (1869)
Iowa	*Dodd* v. *Lorenz*, 210 Iowa 513, 231 N.W. 422, 424 (1930)
Kansas	K.S.A. 25-407 (1964)
Kentucky	K.R.S. Ann. 117.610 (1963)
Maine	1959-60 Att'y Gen. Rep. 158
Maryland	*Gallagher* v. *Board of Elections*, 219 Md. 192, 148 A. 2d 390, (1959)
Massachusetts	*Lincoln* v. *Hapgood*, 11 Mass. 350 (1814)

Michigan	*Harbaugh* v. *People ex rel Cicott*, 33 Mich. 241, 252 (1876); *Reaume and Silloway, Inc.* v. *Tetzlaff*, 315 Mich. 95, 99, 23 N.W. 2d 219 (1946)
Minnesota	M.S.A. §201.26 (1962)
Mississippi	*Smith* v. *Deere*, 195 Miss. 502, 505, 16 So. 2d 33 (1943)
Missouri	*Chomeau* v. *Roth*, 230 Mo. App. 709, 718, 72 S.W. 2d 997, 999 (1934)
Montana	Rev. Code of Mont. 1947 §23-522 (1967)
Nebraska	R.R.S. 1943 §32-475 (1968)
New Hampshire	RSA 54:10 (1955)
New Jersey	*State* v. *Benny*, 20 N.J. 238, 252 (1955); *Cadwalader* v. *Howell*, 18 N.J.L. 138, 145 (1840)
New Mexico	Const. Art. VII, §4; N.Mex. Stat. Ann. §3-2-50 (1953); *Berry* v. *Hull*, 6 N.Mex. 643, 30 P. 936 (1892)
New York	*Application of Woolley*, 108 N.Y.S. 2d 165, 168 (1951); *Matter of Rooney*, 172 App. Div. 274, 278, 159 N.Y.S. 132 (1916)
North Carolina	Gen'l Stat. N.Car. §163-57 (Supp. 1967)
North Dakota	*Nelson* v. *Gass*, 27 N.D. 357, 146 N.W. 537, 543 (1914)
Ohio	Ohio Rev. Code Ann. §3503.02 (1960)
Oklahoma	*Jones* v. *Burkett*, 346 P. 2d 338, 341 (1959)
Oregon	ORS 250.410 (1967)
Pennsylvania	25 P.S. §2814 (1963)
Rhode Island	*State* v. *Aldrich*, 14 R.I. 171, 174 (1883); *Opinion of the Justices*, 65 R.I. 451, 453, 16 A. 2d 331 (1940)
South Carolina	*Clarke* v. *McCown*, 107 S. Car. 209, 92 S.E. 479, 480 (1917)
South Dakota	Report of Att'y Gen. 1961-62, pp. 77, 79

Tennessee	*Brown* v. *Hows*, 163 Tenn. 178, 182, 42 S.W. 2d 210, 211 (1931)
Texas	V.A.T.S. Election Code art. 5.08 (1967)
Utah	Utah Code Ann. 20-2-14 (1969)
Vermont	1963 Op. Att'y Gen. 106, 108
Virginia	*Kegley* v. *Johnson*, 207 Va. 54, 147, S.E. 2d 735, 737 (1966)
Washington	RCWA 29.01.140 (1965)
West Virginia	*Peck* v. *City Council*, 150 W. Va. 580, 591, 148 S. E. 2d 700, 707 (1966)
Wisconsin	W.S.A. 6.10 (1967)
Wyoming	Wyo. Stat. §22-118.3(k) (Supp. 1967)

2. Residence requires physical presence within the state and therefore does not mean domicile for voting purposes in Illinois (*Stein* v. *County Board of School Trustees*, 85 Ill. App. 2d 251, 229 N.E. 2d 165 (1967); *Clark* v. *Quick*, 377 Ill. 424, 36 N.E. 2d 563 (1941) and Louisiana (*Estopinal* v. *Michel*, 121 La. 879, 46 So. 907, 908 (1908); letter of Louisiana Attorney General to Bipartisan Committee on Absentee Voting dated July 29, 1966).

3. The issue is undecided in Hawaii (*In the Matter of Irving*, 13 Haw. 22, 25 (1900)), Nevada (Const. Art. 2§1, NRS 10.020, 293.495, 293.500 (1967) and the District of Columbia (D.C. Code §1-1102 (1967)).

AUG 4 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 39

RICHARD HALL and CHRISTINE HALL,

Appellants,

—v.—

HARRIET BEALS, Clerk and Recorder of El Paso County, and BESS TITUS, Election Supervisor of El Paso County,

Appellees.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AND AMERICAN CIVIL LIBERTIES UNION OF COLORADO, *AMICI CURIAE*

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Appellees.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF COLORADO, *AMICI CURIAE*

Interest of *Amici Curiae*

The interest of the American Civil Liberties Union and its Colorado affiliate stems from their work as civil liberties organizations. Since its founding in 1920, the American Civil Liberties Union has sought to prevent and to redress violations of civil liberties protected by the United States Constitution, through litigation, educational programs, public statements, and petitions to the government. Its intention has never been to profit financially from its work or to further the interest of any special group, but rather, to defend the civil liberties of all persons equally. It is hoped that the arguments here presented, as an organization experienced and specially concerned with mat-

taining constitutionally guaranteed liberties may be of aid to the Court in its adjudication of the fundamental issues raised in this case.*

Summary of Argument

This case raises important questions as to the means of selecting the President, the extent of the states' power to determine how the President is chosen, and the nature of national citizenship. Jones asserts that Colorado's durational residence requirement for voting in Presidential elections is unconstitutional.

Jones first contends that the right of a citizen to vote in a Presidential election held by a state is inherent in the political freedom protected by the First Amendment and that it is rooted in the rights of speech, press, assembly, petition and association. Further, Jones asserts that voting is a form of political association in the broad political and that it is the means of securing the consent of the people essential to the responsiveness of the government to its people's will and essential to its continued legitimacy. No interest of the state in preventing fraud, in the administration of church related districts, or in having a broadly constituted electorate can justify the broad prophylactic restraint imposed on the right to vote for President.

Both the right to vote for Presidential electors and the right to travel interstate must be considered principles and immunities of national citizenship and are therefore protected from infringement by the state exercising [illegible]

* Letters of consent to the filing of this brief have been filed with the Clerk of Court.

pelling state interests which, as pointed out, do not exist in this case. Similarly, because durational residence requirements for presidential voting single out a group of voters for differential treatment and thereby either penalize the exercise of the would-be voters' right to travel or inhibit the exercise of the would-be traveler's right to vote, the Equal Protection Clause of the Fourteenth Amendment requires that the extraordinary decree withstand the closest scrutiny and promote compelling state interests.

Finally, although appellants are now eligible to register to vote in Colorado for President, other people will be disqualified at future presidential elections. Neither the passage of time nor the reduction of the length of required residence will cure such cases. Appellants have a continuing interest in having the electoral system operate properly, and a coordinate interest in preventing political strife with other disqualified voters at future presidential elections.

ARGUMENT

I.

The right to vote in presidential elections is a right protected by the First Amendment from abridgement by the states, except in cases of compelling state interests.

A. *The Right to Vote Is Inherent in the Political Freedom Protected by the Rights of Speech, Press, Assembly, and Petition Guaranteed by the First Amendment*

The First Amendment is "a charter for government." *Thomas v. Collins*, 323 U. S. 516, 537 (1945). Although its protection extends to purely private interests, such as marital privacy, *Griswold v. Connecticut*, 381 U. S. 479 (1965), the basic function of the guarantees of speech, press, assembly, and petition is to protect the political freedom of citizens from erosion by government action. The political freedom protected by the First Amendment includes relations with the federal government, as well as the states.

The First Amendment rights of speech, press, assembly, and petition are "cognate" rights having a common origin in the political freedom of the people. *Thomas v. Collins*, 323 U. S. 516 (1945); *De Jonge v. Oregon*, 299 U. S. 353 (1937). First Amendment rights are not ends in themselves, but are protected in order to preserve the right of the people to exercise fully and effectively their political power. If the right to vote were not constitutionally guaranteed, the rights of speech, press, assembly, and petition

could be reduced by the states to a right to engage in futile rhetoric.

But more than that is intended by the First Amendment. It protects not simply the right to speak and assemble, but to speak and assemble effectively. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U. S. 308 (1968). It protects not only the right to state facts, but also "the opportunity to persuade to action." *Thomas v. Collins*, 323 U. S. 516, 537 (1945). The object of its guarantee of political freedom is to assure that government is "responsive to the will of the people," and to enable the people to bring about desired political and social changes. *Stromberg v. California*, 283 U. S. 359, 369 (1931); *Roth v. United States*, 354 U. S. 476, 484 (1957). Specifically, the protections of that amendment relate to the right to persuade elected officials to enact legislation, *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), and of the people in a democracy to use "ballots" to express their political views about public officials. *New York Times v. Sullivan*, 376 U. S. 254, 299 (1964) (Goldberg, J., concurring). The selection of the President is a form of "expression of the views of the people." *McPherson v. Blacker*, 146 U. S. 1, 26 (1892).

The right to vote, although not specifically mentioned in the First Amendment, is essential to the "security and efficacy" of those rights that are mentioned. Voting is the final and authoritative act of political expression which gives the exercise of the rights of speech, press, assembly, and petition their potential for effectiveness, and thus in connection with their political character. The right to vote is therefore inherent in the First Amendment idea of political freedom and expression. Though not specifically men-

tioned, it is within the penumbra of that amendment necessary for the presentation and effectiveness of those rights specifically mentioned. See *Griswold* v. *Connecticut*, 381 U. S. 479 (1965).

B. *Voting Is a Form of Assembly and Association*

Peaceful physical assemblies have long been protected from abridgement by the states. *De Jonge* v. *Oregon*, 299 U. S. 353 (1937). More recently, constitutional protection has been extended to non-physical assemblies, in the developing right of "association." See *Williams* v. *Rhodes*, 393 U. S. 23 (1968); *United Mine Workers* v. *Illinois State Bar Association*, 389 U. S. 217 (1967); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); *N. A. A. C. P.* v. *Alabama ex rel. Flowers*, 377 U. S. 288 (1964); *Brotherhood of R. R. Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964); *Gibson* v. *Florida Legislative Investigative Committee*, 372 U. S. 539 (1963); *N. A. A. C. P.* v. *Button*, 371 U. S. 415 (1963); *Louisiana ex rel. Gremillion* v. *N. A. A. C. P.*, 366 U. S. 293 (1961); *Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Bates* v. *City of Little Rock*, 361 U. S. 516 (1960); *N. A. A. C. P.* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958).

The association of sovereign individuals to form a body politic is the most basic form of "peaceable assembly." The idea of the state as an assembly, association, or combination of sovereign individuals can be traced from the earliest American political institution, the Mayflower Compact of 1620,[1] and from the Fundamental Orders of Con-

[1] "We . . . doe by these presents solemnly & mutualy in the presence of God, and one of another, covenant & combine our selves togeather into a civill body politick, for our better ordering & preservation & furtherance of the ends aforesaid . . ." Mayflower Compact, in 1 Documents on Fundamental Human Rights, 106-7 (Z. Chafee, Jr., ed.) (Atheneum ed. 1963).

necticut of January 24, 1639.[2] At the root of this conception of government is the necessity of securing the consent of the people.[3] The Declaration of Independence states the fundamental premise of American politics that "Governments are instituted among Men, deriving their just

[2] ". . . we the Inhabitants and Residents of Windsor, Harteford, and Wethersfield . . . doe therefore assotiate and conjoyne our selves to be as one publike State or Commonwealth; and doe . . . enter into Combination and Confederation togather . . . " Z. Chaffe, Jr., *supra*, Fundamental Orders of Connecticut, 116-17.

[3] Locke, to whom Jefferson and the framers of the Constitution were indebted, described the social compact this way:

> And thus every man, by thus consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority and be concluded by it; or else this original compact, whereby he with others incorporates into one society, would signify nothing, and be no compact, if he be left free and under no other ties than he was in before in the state of nature."

J. Locke, The Second Treatise on Government (1764), Ch. VIII, Sec. 97, The Liberal Arts Press, Inc.; New York, 1952, 55.

> And this is done by barely agreeing to unite into one political society, which is all the compact that is, or needs be, between the individuals that enter into and make up a commonwealth. And thus that which begins and actually constitutes any political society is nothing but the consent of any number of freemen capable of a majority to unite and incorporate into such a society.

J. Locke, The Second Treatise on Government (1764), Ch. VIII, Sec. 99, The Liberal Arts Press, Inc., New York, 1952, 56.

> The constitution of the legislative is the first and fundamental act of society, whereby provision is made for the continuation of their union under the direction of persons and bonds of laws made by persons authorized thereunto by the consent and appointment of the people, without which no one man or number of men amongst them can have authority of making laws that shall be binding on the rest. When any one or more shall take upon them to make laws, whom the people have not appointed so to do, they make laws without authority, which the people are not therefore bound to obey.

J. Locke, The Second Treatise on Government (1764), Ch. XIX, Sec. 212, The Liberal Arts Press, Inc., New York, 1952, 120.

powers from the consent of the governed," a premise repeated in the constitutions of many of the states.[4] See also *Texas* v. *White,* 74 U. S. (7 Wall.) 700, 721 (1869); *United States* v. *Wood,* 295 F. 2d 772, 784 (5th Cir. 1961).

The continued legitimacy and security of government depend ultimately upon its preservation of political freedom and upon its responsiveness to the continued expression of consent or dissent of the people. See *Stromberg* v. *California,* 283 U. S. 359, 369 (1931). The control retained by the people over their elected representatives is their "security" for the proper exercise of sovereignty surrendered to the state, and is a condition of the basic social compact. See *McCulloch* v. *Maryland,* 4 Wheat. 316, 428 (1819). Voting is the institutionalized means for the people to express their consent, and it is, therefore, the continuous process by which the people participate in the legitimization of government, in the basic social compact, and in the peaceable assembly and association of individuals in the body politic.

The United States is a government based on these principles. It is a union not only of the states, but of the people. See *United States* v. *Cruikshank,* 92 U. S. 542, 549-550 (1876); *Texas* v. *White,* 74 U. S. (7 Wall.) 700, 720-721 (1869); and *Penhallow* v. *Doane,* 3 U. S. 53, 93-94 (3 Dall. 54) (1795).[5] In *Minor* v. *Happersett,* 88 U. S.

[4] E.g., the Colorado Constitution, Art. II, Sec. 1, which provides:

> All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

[5] Significantly, the Preamble to the Constitution provides that "We the People of the United States . . . do ordain and establish this constitution for the United States of America."

(21 Wall.) 162, 165-166 (1875), the Court spoke expressly of this association:

> There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association.

In *United States* v. *Cruikshank*, 92 U. S. 542, 549 (1876), Mr. Chief Justice Waite stated:

> 'Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights.

The right of members of the national political community to vote for the President and the Vice-President of the United States is part of the national social compact. Without that right in the people, the United States would lack the consent which is the basis for its legitimacy.

The right to vote for President has been recognized as a "privilege" of citizens of the United States. See *Burroughs* v. *United States*, 290 U. S. 534 (1934). While the Privileges and Immunities Clause of the Fourteenth Amendment protects this right to vote for President and Vice-President from abridgement by the states, the source of the right is in the freedom of association and the political freedom secured by the First Amendment.

The assembly of votes together is another means of association, involving elements of speech, assembly, and petition and demonstrating the cognate nature of these rights and their function in practice, of giving effect to political expression.[6]

Other forms of political association are protected by the Constitution, and are inhibited and chilled by the denial of the right to vote. These include the association of individuals for the purpose of promoting the passage of legislation for the relief of the poor, *Herndon* v. *Lowry,* 301 U. S. 242 (1937), or for the purpose of encouraging the enactment of legislation aimed at destroying economic competitors, *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U. S. 127 (1961). Also protected is the right of individuals to associate with and to act peacefully for political parties, organized to promote Marxism, *Herndon* v. *Lowry,* 301 U. S. 242 (1937); *De Jonge* v. *Oregon,* 299 U. S. 353 (1937), or Nazism, *United States* v. *Korner,* 56 F. Supp. 242 (S. D. Cal. 1944), or racism, *Fields* v. *Fairfield,* 375 U. S. 248 (1963); *Carroll* v. *Princess Anne,* 393 U. S. 175 (1968).

Membership in a political party is a form of association protected from being stifled even to promote arguably valid state interests. See *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960); *Schware* v. *Board of Bar Examiners,* 353 U. S. 232 (1957); and *Thomas* v. *Collins,* 323 U. S. 516 (1945). Holding elective office in a labor union, and voting for elective officers in a bar association may both be

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[6] At one time, it appears, voters were physically assembled together at the time and place of an election, prior to the taking of the poll. See *Ashby* v. *White,* 2 Ld. Raym. 938, 950 (1703) (Holt, *C.J.*, dissenting). The New England town meeting is a closely related institution.

forms of the exercise of the right of association. See *Brown* v. *United States,* 334 F. 2d 488 (9th Cir. 1964), affirmed 381 U. S. 437 (1965); and *Lathrop* v. *Donohue,* 10 Wis. 2d 230, 102 N. W. 2d 404 (1960), affirmed 367 U. S. 820 (1961).[7] Freedom of association also protects the efforts of a political party to seek the votes of the public by placing on the ballot the name of its Presidential candidate. *Williams* v. *Rhodes,* 393 U. S. 23 (1968).

Denial of the right to vote is not only a practical inhibition on the exercise of the right to associate with a political party; in some states it is a legal impediment to party affiliation in internal party affairs. In Colorado, for instance, people who do not meet the durational residence requirement can neither vote in the general, primary, or special elections[8] nor can they be affiliated with a political party or vote in any precinct caucus, assembly, or convention of a political party.[9] The durational residence re-

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[7] In *Lathrop,* the Wisconsin Court held that the integrated bar rule did not require compulsory association because "the rules and by-laws of the State Bar . . . do not compel the plaintiff to associate with any one. He is free to attend or not attend its meeting or vote in its elections as he chooses." 10 Wis. 2d 230, 102 N. W. 2d at 408.

[8] Colo. Rev. Stat. 49-13-1 provides:

> No person shall be permitted to vote at any general, primary, or special election unless his name is found in the registration book . . .

[9] Colo. Rev. Stat. 49-5-1 provides:

> No elector shall vote at any precinct caucus, assembly, or convention of a political party unless such elector shall have been affiliated with the political party holding the caucus, assembly or convention for at least twelve months as shown on the registration books of the county clerk . . . .

Colo. Rev. Stat. Sec. 49-5-2 provides:

> Any unaffiliated registered elector may declare his party affiliation at the time he presents himself to vote at a primary

quirement chills and inhibits the exercise of these associational rights.

C. *Voting Is a Form of Petitioning for Redress of Grievances*

The right to petition for redress of grievances includes the right to vote. See *Spriggs* v. *Clark*, 45 Wyo. 62, 14 P. 2d 667 (1932).

The issues at stake in a Presidential election touch on the survival of the nation and concern the well-being of all the people. The opportunity to vote for President is an opportunity to express effectively grievances about any of the matters within the vast powers of the Presidency, the power to administer the laws, to make judicial and executive appointments, to initiate legislative programs, to substantially influence the economy of the private sector, to act as commander-in-chief, to conduct foreign policy, and to administer an annual budget of almost $200 billion. Not infrequently, citizens have grievances about the exercise of these powers, and have neither influence nor an effective way to present their grievance, except at the polls.[10] Denial of the right to vote for Presi-

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election, as provided in section 49-8-6(1); or by appearing in person before the registration committee at precinct registration; or at any time during which electors are permitted to register by appearing in person before the county clerk or by filing a form which shall be furnished by the county clerk at the request of the elector. Any registered elector who has not declared a party affiliation shall be designated on the registration books of the county clerk as "unaffiliated."

[10] The 1968 New Hampshire Democratic Presidential primary is an example of large numbers of voters voting in a Presidential primary election with a common grievance, the conduct of the war in Vietnam.

dent and Vice-President is an abridgement of this important means of petitioning for redress of grievances.

D. *No Compelling State Interest Exists to Justify Denial of Appellants' Right to Vote*

Statutes restricting the exercise of the right of assembly and other rights protected by the First Amendment are entitled to no presumption of validity, and the burden of establishing their validity is on the party seeking to enforce them. *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S. 539, 546 (1963); *Thomas* v. *Collins,* 323 U. S. 516, 529, 530 (1945). Similarly, restrictions on the exercise of voting rights are not presumptively valid. *Kramer* v. *Union Free School District 15,* —— U. S. ——, 89 S. Ct. 1886 (1969). Restrictions and infringements placed on the right to vote by the states "must be carefully and meticulously scrutinized." *Reynolds* v. *Sims,* 377 U. S. 533, 562 (1964).

Restrictions on rights emanating from the First Amendment require more than a rational basis; they must be based upon "clear and present danger" of public disorder, *Thomas* v. *Collins,* 323 U. S. 516, 530 (1945), upon their tendency to produce "grave and immediate danger" to legitimate state interests, *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 639 (1943), or upon a "compelling state interest," *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 438 (1963). The same "compelling state interest" test, applied to infringements on the rights of association and petition in *Button,* were applied to restrictions on the right to vote in *Williams* v. *Rhodes,* 393 U. S. 23, 31 (1968).

Whether appellant's interest is viewed solely as a right to vote, or as a right of association, the infringement posed

by Colorado's durational residence requirement must be based on a showing of necessity to protect a "compelling state interest." Furthermore, whether appellant's interest is in voting or in associating or petitioning, the restriction may be no broader than is necessary to protect whatever legitimate interest the state may be able to demonstrate it has. *Kramer* v. *Union Free School District 15*, —— U. S. ——, 89 S. Ct. 1886 (1969); *Carrington* v. *Rash*, 380 U. S. 89 (1965); *N. A. A. C. P.* v. *Button*, 371 U. S. 415 (1963).

Three kinds of interests might conceivably be related to Colorado's durational residence requirement for Presidential elections; first, that it assists in preventing fraudulent registration and voting by persons who are not actually residents; second, that it assists in preventing "colonization," or the importation of persons to vote in a closely contested district; and third, that it tends to assure that voters have been exposed to the community long enough to be familiar with its problems and with the position of the candidates on matters of special interest to the State of Colorado.

As to the first, the interest in preventing fraudulent elections is no doubt a legitimate interest of the state, and the question is whether a six-month or ninety-day durational residence requirement is broader than is necessary to deal with the problem. Unless it is supposed that every new resident made ineligible to vote because of the durational residence requirement would perpetrate some form of election fraud if allowed to vote, the requirement is too broad. It disenfranchises honest voters, while protecting the state only from those scarce potential voters willing to commit perjury on the question of residence

but unwilling to do so on the question of durational residence. A narrower protection, aimed specifically at offenders, exists in the form of Colorado statutes making fraudulent voting a misdemeanor.[11]

As to the problem of "colonization," it surely cannot be assumed that every new resident voting in a Presidential election in Colorado has come there for the purpose of improperly influencing its Presidential election vote. Colorado has statutes defining the concept of residence for purposes of elections, which are less burdensome on the exercise of the right to vote than is the durational residence requirement.[12] Colorado also has a penal statute

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[11] E.g., Colo. Rev. Stat. 49-21-4, Penalties for election offenses; 49-21-6, Perjury; 49-21-7, Forgery; 49-21-8, Interfering with or impeding registration; 49-21-9, Interfering with election officer; 49-21-10, Interfering with watcher; 49-21-11, Violation of duty; 49-21-13, Unlawful qualification as taxpaying elector; 49-21-14, Procuring false registration; 49-21-22, Unlawful giving or promising money; 49-21-23, Unlawful receipt of money; 49-21-34, Unlawful refusing or permitting to vote; 49-21-35, Voting in wrong precinct; 49-21-36, Personating elector; 49-21-37, Voting twice; 49-24-10, Penalties.

[12] Colo. Rev. Stat. 49-3-3:

> Rules for determining residence.—(1) (a) The judges of election in determining the residence of a person offering to vote shall be governed by the following rules, so far as they may be applicable:
>
> (b) That place shall be considered to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning;
>
> (c) A person shall not be considered to have lost his residence who shall leave his home and go into another state . . ., merely for temporary purposes with an intention of returning;
>
> (d) A person shall not be considered to have gained a residence in this state, or in any county in this state, when retaining his home or domicile elsewhere;
>
> (e) If a person moves to any other state, or to any of the territories, with the intention of making it his permanent

in regulating the practice of law, *Brotherhood of R.R. Trainmen* v. *Virginia ex rel. Virginia State Bar*, 377 U. S. 1 (1964); in protecting citizens and officials of the state from notoriety and attention, from bus boycotts and from false charges of official misconduct, *N. A. A. C. P.* v. *Alabama ex rel. Flowers*, 377 U. S. 288 (1964); in having public school teachers who support the Constitution and laws and are not members of the Communist Party or any organization planning to overthrow the government by force, *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966); in preventing the possibility of harm to the public from lawyers with conflicting interests, *United Mine Workers* v. *Illinois State Bar Association*, 389 U. S. 217 (1967); and in promoting a two-party system and attempting to insure that the winning Presidential candidate receives a majority, rather than merely a plurality, *Williams* v. *Rhodes*, 393 U. S. 23 (1968).

The interests which may be relied on by Colorado to justify its durational residence requirement are not of the importance of many of those alleged in the association cases and found by the Court to be inadequate.

Finally, the idea that voters may be required to have some particular degree of knowledge about local problems in order to be able to vote for President is at variance with the principle of maximum freedom of political expression announced in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964). In voting, as in speech, press, petition, and other forms of political expression, an intolerance for error is stifling to society, and "[t]he constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'

N. A. A. C. P. v. Button, 371 U. S. 415, 455." *New York Times* v. *Sullivan*, 376 U. S. 254, 271 (1964).

E. *Article II, Section 1 Does Not Limit Appellants' Right to Vote for Presidential Electors*

The language of Paragraph 2 of Art. II, Section 1 of the Constitution providing for appointment of Presidential electors by the States, "in such manner as the legislature thereof may direct," has been the basis for a number of diverse schemes for choosing electors, in many cases by the legislatures or persons appointed by the legislatures for the purpose of choosing electors, and not by popular vote. See *McPherson* v. *Blacker*, 146 U. S. 1 (1892). It may be argued that the Colorado legislature is authorized by this provision to direct that Presidential electors be chosen by popular vote, without the votes of persons who do not meet its durational residence requirements. The argument is unsound for two reasons.

First, although every particular election held under state auspices may not be constitutionally required by either the First Amendment or the Republican Form of Government clause of Art. IV, Sec. 4, the First Amendment does, nevertheless, guarantee the right to vote in matters that are decided by popular vote. For example, the Illinois state legislature was not constitutionally required to enact its Workmen's Compensation Act and the Congress was not constitutionally required to enact its Federal Employer's Liability Act, but once these statutes were enacted, the First Amendment protected the right of claimants to seek their benefits. See *United Mine Workers* v. *Illinois State Bar Association*, 389 U. S. 217 (1967);

and *Brotherhood of R.R. Trainmen* v. *Virginia ex rel. Virginia State Bar Association,* 377 U. S. 1 (1964).

Second, that argument involves an unwarranted assumption that the state legislature's power to direct the specific manner of choosing electors would prevail, in the event of conflict between Art. II, Sec. 1 and another provision of the Constitution. In the two recent cases where such a conflict occurred, the opposite result was reached. *Moore* v. *Ogilvie,* —— U. S. ——, 89 S. Ct. 1493 (1969); and *Williams* v. *Rhodes,* 393 U. S. 23 (1968). In *Williams* it was held that the legislative powers delegated under Art. II, Sec. 1(2) could not be exercised to regulate Presidential elections in a manner violating the Equal Protection Clause of the Fourteenth Amendment. The opinion of the Court repeatedly refers to "the right to vote," notes the reference to "the right to vote 'for electors for President or Vice-President'" in the Twenty-fourth Amendment, and holds that the impairment of "voting and associational rights . . . is an invidious discrimination, in violation of the Equal Protection Clause." 393 U. S. at 29, 33, 34.

If the right to vote for Presidential electors is rooted in the First Amendment, as we contend, then powers of the Colorado legislature under Art. II, Sec. 1, to direct the manner of choosing electors, must be exercised in a manner consistent with the First Amendment, as well as the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment.

II.

The right to vote for President and Vice-President is a privilege of national citizenship and is abridged by Colorado's residence requirement.

The right to vote for presidential electors may also be considered a privilege and immunity of national citizenship, protected from infringement by the states by the Fourteenth Amendment. *Twining* v. *New Jersey,* 211 U. S. 78, 97 (1908); *United States* v. *Moore,* 129 Fed. 630 (N. D. Ala. 1904). Cf. *United States* v. *Bathgate,* 246 U. S. 220 (1918).

The privileges and immunities of national citizenship are those rights which arise out of the nature and essential character of the Federal Government. *Twining* v. *New Jersey,* 211 U. S. 78, 97-98 (1908); *Duncan* v. *Missouri,* 152 U. S. 377, 382 (1894); *Giozza* v. *Tiernan,* 148 U. S. 657, 661 (1893); *McPherson* v. *Blacker,* 146 U. S. 1, 38 (1892); *In re Kemmler,* 136 U. S. 436, 448 (1890); *Slaughter-House Cases,* 16 Wall. (83 U. S.) 36, 79 (1873). Even though Article II, section 1(2) of the Constitution provides that Presidential electors shall be chosen "in such manner as the legislature thereof may direct," it is clear that Presidential electors exercise federal functions. *Burroughs* v. *United States,* 290 U. S. 534, 545 (1934); *Ex parte Yarbrough,* 110 U. S. 651, 662 (1884). Cf. *Ex parte Siebold,* 100 U. S. 371, 387-89 (1880). This is particularly so where, as in Colorado, the legislature has chosen to eliminate all intermediate steps between the vote of the people and the vote of the presidential elector

by requiring that the elector cast his vote for the candidate receiving a plurality in the popular election.[14]

Of course, the fact that the right to vote in Presidential elections is a federal right, and a privilege and immunity of national citizenship, does not impair the discretion of the legislature of a state to utilize alternate methods of selecting Presidential electors. See *McPherson* v. *Blacker,* 146 U. S. 1, 28-35 (1892). It does mean, however, that whatever process is used must not deny the privileges and immunities of national citizenship, including the right to vote. Thus, if a state legislature were to assume the responsibility of appointing electors, election of the appointing legislators would become a privilege and immunity of national citizenship.

III.

Denial of the Presidential franchise for failure to satisfy a durational residence requirement violates the appellants' constitutional right of interstate travel.

Colorado's refusal to permit residents of less than six months' duration to vote in Presidential elections is an impermissible burden upon the constitutionally protected right of interstate travel. The right to travel interstate "occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." *United States* v. *Guest,* 383 U. S. 745, 757 (1966). See also *Shapiro* v. *Thompson,*

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[14] Colo. Rev. Stat. 49-20-1 (5) provides as follows:

> Each presidential elector shall be required to vote for the pair of presidential and vice-presidential candidates who received the highest number of votes at the preceding general election in Colorado.

—— U. S. ——, 89 S. Ct. 1322 (1969). There has been considerable discussion as to the source of this right, and at different times it has been bottomed upon the Privileges and Immunities Clause of the Fourteenth Amendment,[15] the grant of power to Congress to control Commerce,[16] the Due Process Clauses,[17] and the concept of the Federal Union implicit in the Constitution.[18]

While restrictions upon both the right to vote and the right to travel interstate have been struck down either because they tend to inhibit the exercise of the respective right[19] or because the exercise of the right is penalized,[20]

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[15] *Edwards* v. *California*, 314 U. S. 160, 177, 181 (concurring opinion) (1941); *Twining* v. *New Jersey*, 211 U. S. 78 (1908); *Crandall* v. *Nevada*, 6 Wall (73 U. S.) 35 (1868); *Corfield* v. *Coryell*, 6 Fed. Cas. 546 (No. 3230) (C. C. E. D. Pa. 1823); *United States* v. *Moore*, 129 Fed. 630 (N. D. Ala. 1904).

[16] *Edwards* v. *California*, 314 U. S. 160 (1941); *The Passenger Cases*, 48 U. S. (7 How.) 282 (1849); *Crandall* v. *Nevada*, 6 (73 U. S. Wall) 35 (1868).

[17] *Williams* v. *Fears*, 179 U. S. 270, 274 (1900) (Fourteenth Amendment); *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589 (1897) (Fourteenth Amendment) (dicta). *Ebel* v. *Drum*, 52 F. Supp. 189, 196 (D. Mass. 1943) (Fifth Amendment). Chaffee, Three Human Rights in the Constitution of 1787, 162 (1956). Cf. *United States* v. *Guest*, 383 U. S. 745, 769-70 (1960) (opinion of Justice Harlan, concurring in part and dissenting in part). The right to international travel has been clearly rested on Fifth Amendment due process grounds. *Zemel* v. *Rusk*, 381 U. S. 1 (1965); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *Kent* v. *Dulles*, 357 U. S. 116 (1958).

[18] Chaffee, Three Human Rights in the Constitution of 1787 (1956); cf. *United States* v. *Guest*, 383 U. S. 745, 758 (1966).

[19] E.g., *Harper* v. *Virginia State Board of Elections*, 383 U. S. 663 (1966) (right to vote); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964) (right to travel).

[20] E.g., *Shapiro* v. *Thompson*, —— U. S. ——, 89 S. Ct. 1322 (1969) (right to travel); *Harman* v. *Forssenius*, 380 U. S. 528 (1965) (right to vote).

the vice of durational residence requirements is a potential restriction upon the exercise of both rights. Either right may be exercised only if the other is surrendered. "The substantiality of the restrictions cannot be doubted. . . . Since freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association." *Aptheker* v. *Secretary of State,* 378 U. S. 500, 507 (1964). Likewise, the constitutional protection afforded to the right to vote by the First Amendment and the Privileges and Immunities Clause of the Fourteenth Amendment makes it clear that the restrictions upon the right to travel are substantial.

IV.

Durational residence requirements for voting deny the equal protection of the laws to the appellants.

A state may enact laws which affect some groups of citizens differently than they affect others. *McGowan* v. *Maryland,* 366 U. S. 420 (1961). However, the selection of persons who shall be treated differently may not be accomplished in an arbitrary or capricious manner. *Baxstrom* v. *Herold,* 383 U. S. 107 (1966).

The classic equal protection test employed to determine whether a particular classification is invidiously discriminatory is whether a rational relationship exists between a permissible state objective and the exclusionary lines which are drawn to effect that objective. *Lindsley* v. *National Carbonic Gas Co.,* 220 U. S. 61 (1911); *Fleming* v.

Nestor, 363 U. S. 603 (1960); *McGowan* v. *Maryland,* 366 U. S. 420 (1961).

However, where the result of the classification is to fetter the exercise of a constitutional right as fundamental as the right to travel or the right to vote for Presidential electors, a rational relationship between the objective to be served and the classification is not enough—the objective of the state must be compelling:

> The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.

Shapiro v. *Thompson,* —— U. S. ——, 89 S. Ct. 1322, 1331 (1969).

Durational residence requirements for voting have been defended on many grounds. The court below asserted two objectives to justify the exclusion of recent migrants from the presidential electorate.

The first of these is the state's interest in the "purity of elections." 292 F. Supp. at 614. The term "purity" refers to the desire to insure that only eligible persons vote.[21] Denial of the franchise for a period of six months,

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[21] [T]he purity of elections . . . consists chiefly in affording qualified electors an opportunity to vote and have their votes counted, and in preventing those not qualified from voting. It means protection, in the exercise of this right.

Mauff v. *People,* 52 Colo. 562, 123 Pac. 101 (1912).

however, is a device far more onerous than necessary to assure that all voters are residents of the state. In striking down Virginia's requirement of filing a "certificate of residence" six months prior to the election as an alternative to payment of a constitutionally prohibited poll tax in federal elections, this Court said:

> The availability of numerous devices to enforce valid residence requirements—such as registration, use of the criminal sanction, purging of registration lists, challenges and oaths, public scrutiny by candidates and other interested parties—demonstrates quite clearly the lack of necessity for imposing a requirement whereby persons desiring to vote in federal elections must either pay a poll tax or file a certificate of residence six months prior to the election. *Harman* v. *Forssenius,* 380 U. S. 528, 543 (1965).

Colorado, of course, does not require a "certificate of residence" to be filed six months before the election. It permits an affidavit submitted contemporaneously with the application for registration to suffice. Thus, the same device that is used to establish residence is used to establish durational residence. It is difficult to see how the latter requirement is of any assistance in establishing the fact of residence.

The second objective recognized by the court below as justifying a six-month durational residence requirement was "administrative reasons" 292 F. Supp. at 614. Presumably this means the time necessary to process registration applications. It is clear, however, that remote administrative benefit to the state will not justify deprivation of a fundamental constitutional right. *Harman* v. *Forssenius,* 380

U. S. 528, 542 (1965); *Carrington* v. *Rash,* 380 U. S. 89, 96 (1965); *Oyama* v. *California,* 332 U. S. 633, 646-47 (1948).

The only occasion on which this court has dealt directly[22] with durational residence requirements for Presidential voting is *Drueding* v. *Devlin,* 234 F. Supp. 721 (D. Md. 1964), *affirmed per curiam,* 380 U. S. 125 (1965). In that case the District Court found that exclusion from the franchise was justified on two grounds. The first was to identify the voter and protect against fraud,[23] a ground similar to the preservation of "purity" asserted by the court below.

The second ground in *Drueding* was to "insure that the voter will 'become in fact a member of the community, and as such have a common interest in all matters pertaining to its government.'" [24] Of course, the relevant community in a Presidential election is a national one. One could argue nevertheless that the state has an interest in insuring that a newcomer resides for a sufficient time in the state to view the issues raised in the national election from the perspective of his new identity as a Colorado citizen. Insofar as this interest is based on what the prospective voter's political interests are likely to be, rather than upon his intellectual ability to perceive that interest, however, it is not constitutionally legitimate:

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[22] In *Blake* v. *McClung,* 172 U. S. 239 (1898), however, the Court, while discussing the limits upon the Privileges and Immunities Clause of Article IV, Section 2, said in dicta at 256:

> So, a state may, by rule uniform in its operation as to citizens of the several states, require residence within its limits for a given time before a citizen of another state who becomes a resident thereof shall exercise the right of suffrage or become eligible to office.

[23] 234 F. Supp. at 724.

[24] *Ibid.*

Appellants' interest in the electoral system resembles the interest of a taxpayer in the fiscal system. In a suit by a taxpayer complaining of the unconstitutionality of an expenditure by the United States, the rule is that a case or controversy exists sufficient to confer standing where, *first*, there is a "logical link" between the taxpayer's status and the type of legislation attacked, and, *second*, the legislation is challenged as being in violation of a specific constitutional limitation on the legislative powers: *Flast* v. *Cohen*, 392 U. S. 83, 102-103 (1968).

Using the same standards to assess the standing of appellants, now eligible to vote, to challenge the constitutionality of this part of the electoral system, the nature of appellants' continuing interest in the constitutionality of the residence requirement is clear.

First, there is a direct connection between appellants' status as voters and the effects of the durational residence requirement in future Presidential elections. The continued operation of durational residence requirements could affect appellants' interests in future Presidential elections in three different ways. (1) Appellants may move again and again and have their right to vote for President and Vice-President infringed by the durational residence requirement of another state. (2) As citizens of the United States, appellants are interested in the integrity of the electoral system and have a legitimate interest in maintaining an electoral system free of arbitrary and irrational exclusions and in continuing to have the benefit of citizenship in a "more perfect union," whose institutions govern with the consent of the governed. (3) As voters in future Presidential elections in Colorado, appellants have an interest, protected from abridgement by the First Amendment right

of association, in forming a political association with other people of similar political views to elect a candidate.[29] The associational rights referred to in *Williams* included not only the right of a candidate to associate with voters, but, more broadly, "the right of individuals to associate for the advancement of political beliefs" 393 U. S. at 30. The Colorado durational residence requirement will to some extent prohibit appellants' exercise of their right to associate with others for the advancement of a specific political belief: who should be President.

Second, the Colorado statute is in violation of express constitutional limitations on the exercise of legislative powers by the states in the selection of a President. If the taxing provisions of Art. I, Sec. 8 (1) of the Constitution are specifically limited by the Establishment Clause of the First Amendment, as in *Flast*, the elector selection power mentioned in Art. II, Sec. 1 (2) is specifically limited by the First Amendment rights of speech, assembly, petition and association, and by the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment. See *Williams* v. *Rhodes*, 393 U. S. 23 at 29, 31 (1968).

In a case decided without even discussing the litigant's standing, the constitutional validity of Section 4 (e) of the Voting Rights Act of 1965 was sustained against the com-

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[29] Although the way potential voters might vote may not form the basis for restrictions by the state on the right to vote and, from the state's point of view, must be irrelevant, see *Carrington* v. *Rash*, 380 U. S. 89 (1965), it is highly important to candidates and voters and is relevant to their legitimate interests in seeking political support. See *Moore* v. *Ogilvie*, —— U. S. ——, 23 L. Ed. 2d 1, 89 S. Ct. 1493 (1969); and *Williams* v. *Rhodes*, 393 U. S. 23 (1968).

plaint of registered voters in New York that by suspending the enforcement of New York's literacy requirement as to persons with a sixth-grade education in an American flag school in a language other than English, Section 4 (e) would enable many otherwise ineligible Puerto Ricans to vote, *Katzenbach* v. *Morgan,* 384 U. S. 641 (1966). Evidently, the interest of the *Katzenbach* plaintiffs in (1) being able to vote in an electoral system operating properly under standards designed by the state constitution and legislature, and (2) not associating politically with Puerto Ricans, was sufficient to create a case or controversy and give the plaintiffs standing. Appellant's continuing interests in this case are not materially different, and are sufficient to avoid dismissal of the case for mootness.

The issue here is raised in a context of concrete facts with sufficient detail and precision to create a clear focus on the competing interests. The competing interests have had all the illuminating benefit of an adversary presentation, so that the matter is a legitimate case or controversy. See *United States* v. *Fruehauf,* 365 U. S. 146, 157 (1961).

Because of the critical and fundamental nature of the constitutional rights involved, and because of the certainty of continued abridgement of those rights, this case should properly be decided now, rather than waiting for further injury. See *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965).

CONCLUSION

In *Ashby* v. *White*, 2 Ld. Raym. 938, 953 (1703), Chief Justice Holt, dissenting, said:

> A right that a man has to give his vote at the election of a person to represent him in parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendent thing, and of an high nature, and the law takes notice of it as such in diverse statutes . . .

For the reasons stated, the Court should reverse the judgment of dismissal entered by the District Court and remand for entry of a proper judgment.

Respectfully submitted,

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In The Supreme Court Of The United States

October Term, 1969

No. 39

RICHARD HALL AND CHRISTINE HALL,

Appellants

v.

HARRIET BEALS, Clerk and Recorder of El Paso County, and BESS TITUS, Election Supervisor of El Paso County,

Appellees

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

APPELLEES' BRIEF ON THE MERITS

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In The Supreme Court Of The United States

October Term, 1969

No. 39

RICHARD HALL AND CHRISTINE HALL,

Appellants

v.

HARRIET BEALS, Clerk and Recorder of El Paso County, and BESS TITUS, Election Supervisor of El Paso County,

Appellees

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

APPELLEES' BRIEF ON THE MERITS

QUESTIONS PRESENTED

1. Whether this appeal is moot, thereby requiring outright dismissal, since there is now no actual controversy involving

real and substantial rights between the parties hereto.

2. Whether the two-month voting residence requirement of C.R.S. (1963), 49-24-1, as amended, is so unreasonable as to amount to a prohibited discrimination under the Equal Protection Clause of the Fourteenth Amendment.

3. Whether the two-month residence requirement of C.R.S. (1963), 49-24-1, as amended, is an unconstitutional infringement upon Appellants' "right to travel", with particular emphasis upon the Privileges and Immunities Clause of the Fourteenth Amendment.

STATEMENT

This Appeal presents the issue as to the constitutionality of the Colorado State residence requirement, C.R.S. (1963), 49-24-1, as amended, in United States Presidential and Vice-Presidential elections.

On October 4, 1968, the Appellants filed their Complaint in the District Court of the United States for the District of Colorado, alleging: That they were citizens of the United States and residents of the State of Colorado since June 15, 1968, having moved from the State of California; That they were desirous of voting in the November 5,

1968, Presidential and Vice-Presidential election; That they were refused permit to register as voters in the State of Colorado, despite their repeated efforts to do so, because they were unable to comply with the State's six-month residency requirement; That because they were no longer California residents, that State also refused them permit to register to vote; That they were otherwise qualified voters; That the Colorado six-month residency requirement was unreasonable and unconstitutional; That they were suing in behalf of themselves and all other citizens similarly situated to (1) compel Appellees, as election officials, to register them; (2) to enjoin the enforcement of the six-month residency requirement; or, in the alternative, (3) conditional registration pending court determination of the issue.

On October 30, 1968, by order, the District Court of the United States for the District of Colorado dismissed their Complaint. This was supplemented by a memorandum opinion dated November 29, 1968, Hall v. Beals, 292 F.Supp. 610 (D.C. Colo. 1968). Appellants are appealing from that decision.

SUMMARY OF ARGUMENT

The decision below is in accordance with the law. Drueding v. Devlin, 234 F. Supp. 721 (D.Md., 1964) aptly stated the law, and that decision was affirmed

per curiam by this Court at 380 U.S. 125 (1965). Drueding, Id., remains the law as there has been nothing subsequent to mollify its impact. Save for the names, dates, places, and length of residency requirements, the facts in the two cases are identical. The Court in Drueding, Id., concluded that the voting residency requirement of one year in Maryland was not so unreasonable as to amount to an irrational or unreasonable discrimination, and the Complaint was therefore dismissed. A fortiori, therefore, since the Colorado residency requirement, at issue, is only two months, the Colorado statute is certainly reasonable as measured by the Equal Protection Clause.

Appellees' position is that:

1. There is now no actual controversy involving real and substantial rights between the parties hereto, and the appeal should, therefore, be dismissed outright.

2. The constitutionality of the old six-month residency requirement is not in issue because it has been amended to two months.

3. The two-month residency requirement of Colorado Revised Statutes 1963, Section 49-24-1, as amended, is neither in violation of the Equal Protection Clause nor the Privileges and Immunities Clause of the Fourteenth Amendment.

4. Drueding, Id., remains the law.

I.

The relief requested by Appellants in their original Complaint, i.e., the ability to vote in the Presidential Election of 1968, cannot now be granted. Further, the Appellants have now fulfilled the then-existent six-month residency requirement of the State of Colorado, and are therefore now fully eligible to vote in the next Presidential Election in 1972. Finally, the six-month residency requirement has recently been amended to two months. C.R.S. 49-24-1, as amended (April 23, 1969).

Mills v. Green, 159 U.S. 651 (1895) aptly summed up the law with regard to mootness, and under its authority, this case is clearly moot. Moore v. Ogilvie, 394 U.S. 814 (1969), relied upon by Appellants, is not applicable to the instant case because "the problem" is not "capable of repetition" since Colorado has amended their statute down to two months. This Court has established practical safeguards and restrictions of long standing which clearly delineate its consideration of constitutional questions. These principles were clearly set forth by Mr. Justice Brandeis, concurring, in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, at page 346, et.seq. (1936).

cussed supra, is, in and of itself, dispositive of the issue

Going further, however, utilizing the traditional "Equal Protection" test, it is seen that a rational relationship exists between permissible state objectives and the two-month voting residency requirement. These permissible state objectives (legitimate state interests) are:

1. To preserve the purity of elections.
   a. To identify the voter.
   b. To prevent double-voting (voting in more than one state).
   c. To prevent a "colonization" of voters.
   d. All of the above to prevent voting fraud.
2. To insure that the voter is, in fact, a member of the state community, and as such has an interest in all matters (including federal issues) pertaining to its government (both state and federal).
3. Administrative reasons.
   a. A "new resident" voter must be registered in advance of the election as are all other qualified voters in Colorado.
   b. The number of: polling places, voting judges,

> precinct clerks, etc. are dependent upon an advance registration of voters including "new resident" voters. It takes time to translate "raw" registration data down to the various precinct requirements.

Concrete examples are pointed out in the Argument whereby these legitimate state interests are served by the two-month voting residency requirement.

It is clear that "Election Day" is not a sufficient time period for a state to fulfill these aforesaid objectives. Now, if one day, or a portion thereof, is not a sufficient time period to accomplish these legitimate state interests, then how can one say that two months is an unreasonable period of time.

Appellees contend that the "compelling state interest" test has never been applied to the fundamental state voting requirements of residency, requisite age, and United States citizenship. See: Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969). A close reading of both these cases lends to the conclusion that the "compelling state interest" test was applied only to voter qualifications imposed over and above the fundamental requirements of residency, requisite age, and United States

Nevertheless, Appellees contend that the permissible state objectives set forth, supra, are, in fact, "compelling state interests". These compelling state interests when weighed against the brevity of the two-month residence requirement certainly satisfy the reasonableness requirements of the Equal Protection Clause of the Fourteenth Amendment.

Moving to the Privileges and Immunities Clause, there is not one case that has ever held that the right to vote for President and Vice-President is a "privilege and immunity" of federal citizenship. On the contrary, the cases hold that the right to vote for President and Vice-President is an attribute of state citizenship. Drueding v. Devlin, cited supra; Gray v. Sanders, cited supra; Pope v. Williams, cited supra; Minor v. Happersett, cited supra. Since there is no federal right to vote for President and Vice-President, then it becomes patently clear that Colorado's two-month voting residency requirement cannot "abridge" a non-existent right.

Appellants' use of the "welfare residency cases" to support their "Privileges and Immunities" argument is inappropriate. Colorado's voting residency requirement in no way violates Appellants' right to travel. The welfare

following reasons:

1. The Colorado voting statute does not create "a chilling effect on the right to travel."

2. One of the admitted purposes of the welfare residency requirements was to discourage entry of the poor into the respective states. Clearly there is no such purpose with respect to Colorado's two-month voting residency requirement.

3. Shapiro v. Thompson, Id., affirmed Thompson v. Shapiro, 270 F.Supp. 331 (D.Conn. 1967). That case, below, aptly distinguished welfare residency from voting residency by quoting Carrington v. Rash, 380 U.S. 89, at 96 (1965):

> "Texas is free to take reasonable and adequate steps * * * to see that all applicants for the vote actually fulfill the requirements of bona-fide residence." 270 F.Supp. at 338.

4. Finally, Mr. Justice Brennan, writing for the majority, at 394 U.S. 638, Fn.21, declares that, Shapiro, implies no view as to the validity of state residence requirements determining the eligibility to vote.

Immunities" argument to show a violation thereof by Colorado's two-month voting residency requirement None of Appellants' federal "privileges and immunities" (rights) have been violated by the Colorado statute.

IV.

As discussed supra, Drueding v. Devlin, cited supra, remains the law as to the questions presented in the instant case None of the cases decided since Drueding in any way mollify its impact. In the Argument (Part IV-A) of this brief, every case cited by Appellants since Drueding is discussed to graphically illustrate that Drueding remains the law. Other cases decided subsequent to Drueding, affirming the Drueding rationale, are also discussed in the Argument (Part IV-B).

Drueding is therefore the law, and is dispositive of the merits in the instant case Additional authorities cited and reason, as outlined in the Argument, buttress the conclusion that the Colorado statute is not in violation of the Constitution of the United States

ARGUMENT

I THERE IS NOW NO ACTUAL CONTROVERSY INVOLVING REAL AND SUBSTANTIAL

RIGHTS BETWEEN THE PARTIES HERETO THE APPEAL SHOULD THEREFORE BE DISMISSED

The Appellants in their Complaint (Appendix, pages 13-14) prayed for: (1) A Writ of Mandamus to compel Appellees, as election officials, to register Appellants "to vote as a qualified elector for the office of President and Vice-President in the forthcoming National Election;" (2) An Injunction restraining the enforcement of the six-month residency requirement "to vote in the National Election for the Office of President and Vice-President;" or, in the alternative (3) Permit "to vote in the forthcoming National Election on a conditional basis, so that should either party choose to appeal to the Supreme Court of the United States * * * the relief sought by Appellants would not become moot." (Emphasis supplied.) The permit to vote on a conditional basis was denied. The relief, therefore, "sought by Appellants," has become moot.

Obviously, the relief requested by Appellants cannot now be granted. The same otherwise would be ineffective and futile. And, Appellants in their Complaint, supra, so understood. Since there is now no actual controversy involving real and substantial rights between the parties hereto and no subject matter upon which the judgment of this Court can operate, the appeal should, therefore, be dismissed.

This Court, as early as Mills v. Green, 159 U S 651, at Page 653 (1895), stated:

> "The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence." (Emphasis supplied.)

See also Oil Workers Union v. Missouri, 361 U S 363, 367 (1960); Poe v. Ullman, 367 U.S. 497, 504 (1961).

The issues before the Court are moot upon the further grounds: (1) That the Appellants have now fulfilled the six-month residency requirement; and, (2) That the six-month residency requirement has, by recent legislative enactment, House Bill 1214 (April 23, 1969), been amended to two months.

In passing, suffice it to say that had the two-month residency requirement been in effect prior to the November, 1968, Presidential and Vice-Presidential election, Appellants would have been eligible to vote in that election. Further, on December 15, 1968, the Appellants had met the old six-month residency requirement, thus becoming eligible to vote in succeeding Presidential elections.

The Appellants in anticipation of the "mootness" argument have, on Page 16 of their Brief, in effect conceded the question but argue that "the problems imposed by state residence requirements will continue to plague future elections, and the question should therefore be decided by this Court for the guidance of the states and courts below that may face this problem in the future." (Emphasis supplied.)

Appellants cite Moore v. Ogilvie, 394 U.S. 814 (1969), as giving the Court the power to make such a determination in the instant case. To begin with,

Moore, supra, commenced as a suit in declaratory (and injunctive) relief, pursuant to 28 U.S.C., Sections 2201 and 2202. Here, on the other hand, Appellants made it clear in Paragraph 1 of their Amended Complaint that they were proceeding under 28 U.S.C., Section I343(3) - not Sections 2201 and 2202. (See Page 10 of the Appendix.) Declaratory relief, therefore, cannot be granted and Moore, supra, is inapplicable.

Further, in Moore, supra, the statute under attack had not been changed in over thirty-four years. There this Court stated:

> "The problem (of nominating electors in federal elections) is therefore 'capable of repetition, yet evading review' * * * as long as Illinois maintains her present system as she has done since 1935." (Emphasis supplied.)

Here, the statute under attack has, since the commencement of this suit, been amended from a six-month residency requirement in Federal elections to two months. C.R.S. (1963), 49-24-1, as amended, now provides:

> "Eligibility of new residents to vote. Any citizen of the United States who shall have attained the age of twenty-one

> years, who shall have resided, next preceding the election at which he offers to vote, in this state and in the county or city and county not less than two months, and in the precinct not less than fifteen days, and shall have been duly registered as required by the provisions of this article, shall have the right to vote as a new resident for presidential and vice-presidential electors."

The "problem" therefore is incapable of repetition (The instant case is also distinguishable from Gray v. Sanders, 372 U.S. 368 [1963], cited by Appellants, for the same reason.)

This Court has established practical safeguards and restrictions of long standing which clearly delineate its consideration of constitutional questions. These were enumerated in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, at Page 346, et.seq., (1936), in a famous concurring opinion by Mr. Justice Brandeis:

> "1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary, proceeding * * * Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345, * * *

> whether a construction of the statute is fairly possible by which the question may be avoided.' Crowell v. Benson, 285 U.S. 22, 62."

It is clear, in applying the above principles, that there remains for this Court no actual matters in controversy essential to the decision of the case now before it. To express an opinion upon the merits of Appellants' contentions would be to ignore the basic limitations upon the duties and functions of this Court, and to disregard principles of judicial review long established and repeatedly followed.

II. THE CONSTITUTIONALITY OF THE OLD SIX-MONTH RESIDENCY REQUIREMENT IS NOT IN ISSUE.

On the merits, Appellants have based their arguments and framed their issues on the old six-month residency requirement. It is their contention that "There are numerous other states with residence requirements still six months or longer, so the question presented here still affects millions of voters." (Page 17, Appellants' Brief.)

Pending this appeal and subsequent to the lower court's determination, the six-month residency requirement was amended to two months. It is clear that the judgment of a lower court, regardless

of its correctness or incorrectness when entered, must be given appellate consideration, if at all, in view of the amendment. Carpenter v. Wabash Ry., 309 U.S. 23, 26-27 (1940). See also: Hines v. Davidowitz, 312 U.S. 52 (1941).

Accordingly, the Appellees will hereinafter discuss the merits in light of the two-month residency requirement.

III. THE TWO-MONTH RESIDENCY REQUIREMENT OF COLORADO REVISED STATUTES 1963, SECTION 49-24-1, AS AMENDED, IS NOT IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

To begin with, it is to be noted that the constitutionality of C.R.S. (1963), 49-24-1, as amended, is supported by a presumption of validity (Hall of Distributors v. Bowers, 139 F.Supp. 400, 404 [D.C. Ohio, 1956]), and the burden of establishing its unconstitutionality rests upon the Appellants (Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 [1935]). The authority to declare a statute void is of such a delicate and awful nature that the Court will never resort to that authority except in a clear and urgent case. (Calder v. Bull, 3 Dall. [U.S.] 386, 1 L.Ed. 648).

It is fundamental that the primary power to establish voter qualifications rests with the States (Pope v. Williams, 193 U.S. 621 [1904]); that such power

applies to federal as well as state elections (U.S. Const. Art. II, § 1; Gray v. Sanders, 372 U.S. 368 [1963]); that "the states have * * * broad powers to determine the conditions under which the right of suffrage may be exercised" (Lassiter v. Northampton County Elections Bd., 360 U.S. 45 [1959]); and, that the States have "unquestioned power to impose reasonable residence restrictions on the availability of the ballot" (Carrington v. Rash, 380 U.S. 89 [1965]; Lassiter v. Northampton County Elections Bd., cited supra). (Emphasis supplied.)

Specifically, in regard to the case at bar, Article II, Section 1, and the Twelfth Amendment, of the Constitution of the United States, provide that the President and the Vice-President of the United States shall be selected by electors chosen from each state, who shall be appointed "in such manner as the Legislature thereof may direct." (Emphasis supplied.)

The Legislature of the State of Colorado, pursuant to the aforesaid Constitutional mandate, enacted C.R.S. (1963), 49-24-1, as amended, providing for a two-month State residence requirement for otherwise qualified voters in United States Presidential and Vice-Presidential elections.

Appellants contend that the aforesaid residency requirement is violative

of the "Equal Protection" and "Privileges and Immunities" clauses of the Fourteenth Amendment to the United States Constitution. Appellants' contention clearly is without merit.

A. THE COLORADO RESIDENCY REQUIREMENT IS NOT VIOLATIVE OF THE "EQUAL PROTECTION CLAUSE" OF THE FOURTEENTH AMENDMENT.

Contrary to popular belief, it is not the citizens of the United States, per se, that elect the President and the Vice-President. It is the States - each acting individually through its electoral college. And, it is the "electors" of the individual states, not the voters therein, that determine for whom the state will cast its electoral votes. It is only logical, therefore, that the individual states have the power to determine the mode of selection of electors in their respective jurisdictions as well as the qualifications of voters therein, so long as the exercise of that power is reasonable.

This Court has stated in McPherson v. Blacker, 146 U.S. 1, at Page 27 (1892):

> "The (Federal) Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket,

> nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object."

Apparently Appellants concede that the States have the power to impose reasonable residence requirements on voters in Presidential and Vice-Presidential elections. (To argue otherwise, of course, would be to disregard the very instrument upon which the Appellants rely in asserting their rights - the Constitution of the United States.)

The only real issue for this Court to decide, therefore, is whether the Colorado Statute which requires residence in the State for two months, before an otherwise qualified voter may vote, is so unreasonable as to amount to a prohibited discrimination under the Equal Protection Clause of the Fourteenth Amendment.

This Court answered the question in the negative in the leading case of Drueding v. Devlin, 234 F.Supp. 721 (D.Md., 1964), aff'd per curiam, 380 U.S. 125 (1965). And, Appellees contend that the aforesaid decision is controlling and determinative of the issues presented in the instant case.

Here, the Court is asked to rule upon the constitutionality of a two-month residency requirement. In Drueding v. Devlin, supra, this Court upheld the State of Maryland's one-year residency requirement. Save for the names, dates, places and length of residency requirement, the facts in the two cases are identical. If this Court upheld the one-year residency requirement, and the shortness thereof is the criteria for determining reasonableness, then clearly, on the basis of logic and under the doctrine of Stare Decisis, this Court should likewise uphold Colorado's two-month (1/6 of a year) residence requirement.

The Court in Drueding reaffirmed the proposition that the States have broad powers in determining voter qualifications, including residency requirements, in the election of President and Vice-President of the United States. In quoting from this Court's opinion in McGowan v. Maryland, 366 U.S. 420, 425 (1961), the Court therein at page 724 of 234 F.Supp., stated:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on

> grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality."

Further, it is to be noted that the Court in Drueding held that the issues involved in the congressional re-districting cases and the legislative reapportionment cases (some of which have been cited by Appellants in the instant case) were not germane to the voter residency issue. Appellees herein likewise contend that such decisions have no applicability to the issues in the instant case. (This is so primarily because of the special provisions of Article II, Section 1, of the United States Constitution. And, as the Court so stated at page 725 of 234 F.Supp.: "it may be noted that the Supreme Court declined to intervene in such cases until it was convinced that there was little hope that the several State legislatures would take remedial action.") The Colorado Legislature has, of course, taken such remedial action by lowering the voting residency requirement to two months.

Finally, the Court in Drueding, by way of dictum, commended those states (such as Colorado) which had shortened their respective state residency requirements for Presidential and Vice-Presidential

elections. In concluding its opinion, the Court held:

> "The Court cannot say that the requirements of the Maryland Constitution and statutes in question here are so unreasonable that they amount to an irrational or unreasonable discrimination. The motion to dismiss must therefore be granted."

In upholding the State of New York's ninety-day state residency requirement for voters in Presidential and Vice-Presidential elections, the Court of Appeals of that State in Van Berkel v. Power, 16 N.Y.2d 41, 261 N.Y.S.2d 876, 209 N.E.2d 539, at page 511 (1965), stated:

> "New York State having not irrationally concluded that a citizen should be such for at least 90 days before he votes, has not violated any of the prohibitions of the Federal Constitution nor has it entered into a pre-empted field. Setting voter qualifications is still the business of the States." (Emphasis supplied.)

Drueding was cited as authority for this decision.

In the case at bar, the Colorado

Legislature has likewise "not irrationally concluded" the necessity for the existence of a two-month residency requirement for voters in Presidential and Vice-Presidential elections. Thus as to "reasonableness," the Appellants in order to succeed herein must show that no reasonable basis whatsoever existed for the two-month residency requirement.

And,

> "The fact that the Court differs with the Legislature in its views of public policy or holds views inconsistent with the propriety of legislation, affords no ground for judicial interference therewith, unless the act is unmistakably and palpably in excess of legislative power; the Legislature being primarily the judge of necessity of enactments respective of local conditions." (Emphasis supplied.) (Hall of Distributors v. Bowers, supra, at page 404 of 139 F. Supp.)

The Colorado Legislature has investigated and found the existence of conditions indicating the necessity of a two-month state residency requirement for voters in national elections. The prime objectives of Colorado's state residency requirements have been enumerated

by the Colorado Supreme Court as follows: (1) To preserve the purity of elections (Mauff v. People, 52 Colo. 62, 123 P. 101 [1912]); and, (2) To prevent the control of state affairs by persons who have no pecuniary interest in them (Merrill v. Shearston, 73 Colo. 230, 214 P. 540 [1923]).

In Drueding v. Devlin, supra, the objectives of statutory residency provisions were noted thusly: (1) To identify the voter and to protect against fraud; and, (2) to insure that the voter will in fact become a member of the community, and as such have a common interest in all matters pertaining to its government.

These objectives have otherwise been stated in 29 C.J.S., Elections, Section 19 and 19(b), commencing at page 69 as follows:

> "The object of prescribing residence as a qualification for the exercise of the elective franchise is not only to identify voters and to prevent fraud, but also to assure that each voter will become in fact a member of his community and take an interest in its government. * * * (§19)
>
> "The purpose of a constitutional or statutory requirement that a voter must be an actual bona-fide resident of the place

where he offers to vote is to provide a term of educational probation and to prevent a colonization of voters." (§19[b]).

It is Appellants' contention that Colorado's two-month residency requirement,

"is an arbitrary and irrational classification serving no legitimate state purpose or end. * * * Colorado's waiting period requirement, when voting for President and Vice-President, does not serve any legitimate state interests whatsoever. * * *" (Appellant's Brief, page 9.)

On page 10 of their Brief, Appellants further argue that,

"(a) Residence <u>in Colorado</u> is not relevant to a voter's being a member of the community to be governed by the one to be elected, for such 'community' in a Presidential election is the national community, not a state community * * * (b) Residence <u>in Colorado</u> does not make a voter any more qualified to vote for President, nor any more familiar with the candidates and issues involved * * *."

Sharp issue is taken with these contentions. Constitutionally, the states, not the individual voters, elect the President. The proof of this is found in our Electoral College system whereby a traditionally close vote in a state such as California, for example, results in the Presidential candidate receiving a "bare" majority of the popular vote taking all of the electoral votes of our most populous state. Are not all those voters who voted for the minority candidate in California disenfranchised by the electoral college system set up by our federal Constitution? Clearly so, and this is the heart of the matter. It is the States and not the individual citizens who elect the President. If this concept is repugnant to our present-day views of democracy, then the reform lies in the abolition of the Electoral College system by Constitutional Amendment which must be ratified by three-fourths of the States. Such reform cannot arbitrarily come from this Court because of our Constitutional framework of separation of powers.

Finally, each state has unique problems which are affected by the domestic platform of a particular Presidential candidate. Some problems unique to the State of Colorado, for example, which may not be shared by other states, are: reclamation, conservation, oil-shale utilization, oil depletion allowance, atomic energy experiments, storage of

U.S. Army poisonous gas, status of federal lands, federal land management, national forests, interstate water compacts, etc. Is it not a legitimate State interest to insure to some small degree (i.e., a two-month requirement of residency within the State) that a new resident therein become familiar with these problems? Should not the resident Colorado voter have these interests in mind when casting his vote for President and Vice-President - particularly since his vote could determine how all of Colorado's electoral votes might be cast? Both questions clearly must be answered in the affirmative.

Appellants apparently contend there should be no residency requirements whatsoever. Even administratively speaking this, of course, would be impossible. The voting process in Colorado requires prior registration, sending of registration lists to the precincts, setting up voting machines (number to correspond to precinct registration), planning the number of polling places to be assigned to a given precinct based upon registration, etc.

Assume, arguendo, there are no state voting residency requirements. It is Presidential Election Day, 1972. A voter is a bona-fide resident of the State of New York. He votes in his local Manhattan precinct. Thereupon, he catches a train to Newark, New Jersey; goes to a Newark precinct; declares himself a resident of New Jersey; and, votes again

for the candidate of his choice. The enterprising voter then catches a train bound for Greenwich, Connecticut. He proceeds to a Greenwich precinct, declares himself a Connecticut resident, and votes once again for the same candidate. All three states will record his vote that day and the respective electors in all three states will be affected.

An extreme situation has been depicted to illustrate one compelling point. States control the voting process. There is no Federal registration to vote. This onerous responsibility requires corresponding authority to properly discharge that responsibility. The right to vote springs from one body-politic - and one only - the State wherein one legally resides. It is apparent that no residency requirement whatsoever could result in a disastrous Presidential election as measured by standards of fairness and equality. Now, if the Election Day is not a sufficient time period for a state determining the legitimate residence of its voters, then how can one say that two months is an unreasonable period of time for a state to determine the legitimacy of the residence of a "new resident voter."

The State of Colorado, therefore, has provided for a two-month residence requirement for "new resident voters" in furtherance of legitimate and compelling state interests. These state interests

when weighed against the brevity of the two-month residence requirement certainly satisfy the reasonableness requirements of the Equal Protection Clause of the Fourteenth Amendment.

B. THE COLORADO VOTING RESIDENCY REQUIREMENT IS NOT VIOLATIVE OF THE "PRIVILEGES AND IMMUNITIES CLAUSE" OF THE FOURTEENTH AMENDMENT.

There is not one case that has ever held that the right to vote for President and Vice-President is a "privilege and immunity" of federal citizenship. On the contrary, the cases hold that the right to vote for President and Vice-President is an attribute of state citizenship. Minor v. Happersett, 21 Wall. 162, 177, 22 L.Ed. 627; Pope v. Williams, 193 U.S. 621; Gray v. Sanders, 372 U.S. 368; Drueding v. Devlin, 234 F.Supp. 721 (D.Md., 1964), aff'd per curiam, 380 U.S. 125 (1965).

In Pope v. Williams, supra, this Court aptly stated the law:

> "The privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States, Minor v. Happersett, 21 Wall. 162, 22 L.Ed. 627. It may not be refused on account of race,

> color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a state is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution." 193 U.S. 621, at 632. (Emphasis supplied.)

This remains the law. Appellants cite United States v. Classic, 313 U.S. 299 (1941), to the effect that the right to vote for federal Congressmen is clearly a right of federal citizenship. This is undisputed, but it must be pointed out that Classic clearly states that this right springs from Article I, Sections 2 and 4 (Elections for Senators and Representatives) of the Constitution of the United States and not from the Privileges and Immunities Clause of the Fourteenth Amendment. Id. at 315. It is submitted therefore that Appellants' cite of Classic in conjunction with their "Privileges and Immunities" argument is inappropriate. Likewise with Ex Parte Yarborough, 110 U.S. 651 (1884), Id. at 663. Yarborough, of course, also cited the Fifteenth Amendment as an ancillary

foundation for the rights enunciated therein. Id. at 664, 665. Clearly, the Fifteenth Amendment is not relevant to Appellants' position or contentions.

The right to vote for federal Senators and Representatives, therefore, springs from the States, themselves, and the Constitution of the United States, Article 1, Sections 2 and 4, the Fifteenth Amendment thereto, and the Seventeenth Amendment thereto. It springs therefore from both State and Federal citizenship. There is no legal support, however, for Appellants' contention that it springs from the "Privileges and Immunities Clause" of the Fourteenth Amendment. Thus, there is no support, in this regard, for Appellants' contention that the right to vote for President springs from the "Privileges and Immunities Clause". A fortiori, since there is nothing comparable to the Seventeenth Amendment (providing for Popular Election of U.S. Senators) or Article I, Section 2 (providing for Popular Election of U.S. Representatives), with respect to the election of the President and Vice-President, then it must be concluded under Article II, Section 1, that there is no federal right, per se, to vote for President and Vice-President. The right to vote for President and Vice-President, as distinguished from the right to vote for U.S. Senators and U.S. Representatives, therefore, springs from State citizenship, alone. Since there is no federal right (which includes all federal

privileges and immunities) to vote for President and Vice-President, then it becomes patently clear that Colorado's two-month voting residency requirement for President and Vice-President cannot abridge a non-existent right, privilege, or immunity.

Appellants' attempt to use the "welfare residency cases" in their "Privileges and Immunities" argument is likewise inappropriate as discussed, infra, in IV - A-2.

In conclusion, there is nothing contained in Appellants' "Privileges and Immunities" argument to show a violation thereof by Colorado's two-month voting residency requirement. Appellants have shown none of their federal "privileges and immunities" (rights) to have been violated by said Colorado statute.

IV. DRUEDING REMAINS THE LAW.

A. Drueding v. Devlin, cited supra, remains the law as to the questions presented in this case as there has been nothing to mollify its impact since it was affirmed per curiam by this Court in 1965. This is so despite Appellants' steadfast contentions to the contrary.

1 As to the "equal protection" argument:

As to this argument, Appellants cite

only six cases decided since Drueding, i.e.:

1) Harper v. Virginia Board of Elections, 383 U.S. 663 (1966);

2) Katzenbach v. Morgan, 384 U.S. 641 (1966);

3) Williams v. Rhodes, 393 U.S. 23 (1968);

4) Moore v. Ogilvie, 394 U.S. 814 (1969);

5) Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969);

6) Cipriano v. City of Houma, 395 U.S. 701 (1969).

All can be clearly distinguished.

First, Harper, itself, states, by way of dictum, that the states have the power to fix voter qualifications within the constitutional framework. (Emphasis supplied). It quotes Lassiter v. Northampton Election Board, 360 U.S. 45, 51 (1959), to this effect at 383 U.S. 665. Also, the Court in Harper, states:

> "Thus without questioning the power of a State to impose reasonable residence restrictions on the availability of the ballot (see Pope v. Williams, 193 U.S.

621) * * *" 383 U.S. 663, at 666.

Finally, Harper deals with a subject clearly distinguishable from state residence requirements, i.e., the poll tax. Harper, therefore, is clearly inapplicable to the instant case.

Second, Katzenbach v. Morgan, 384 U.S. 641 (1966) is irrelevant to the disposition of the instant case because Appellants cite it repeatedly to merely state the obvious, i.e., a state (voting) statute is invalid if it violates the Equal Protection Clause. This is elementary, but we have shown why the Colorado two-month residency requirement does not violate the Equal Protection Clause. Appellants make no other use of Katzenbach v. Morgan, cited supra.

Third, Williams v. Rhodes, 393 U.S. 23 (1968), can be clearly distinguished because it applies to a subject area wholly separate and apart, i.e., political parties being listed on a Presidential ballot. It is interesting to note that this Court stated in its majority opinion:

> "And as we have said, the State is left with broad powers to regulate voting, which may include laws relating to the qualification and functions of electors." Id. at 34.

Fourth, Moore v. Ogilvie, 394 U.S. 814 (1969), has already been shown to be clearly inapplicable to the instant case as outlined on page 5 of our brief.

Fifth, Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969) can be clearly distinguished because the Court states:

> "At the outset, it is important to note what is not at issue in this case. The requirements of §2012 that school district voters must (1) be citizens of the United States, (2) be bona fide residents of the school district, and (3) be at least 21 years of age are not challenged. Appellant agrees that the States have the power to impose reasonable citizenship, age and residency requirements on the availability of the ballot. Cf. Carrington v. Rash, 380 U.S. 89, 91 (1965); Pope v. Williams, 193 U.S. 621 (1904)." (Emphasis supplied.)

Mr. Justice Stewart, with whom Mr. Justice Black and Mr. Justice Harlan joined in dissent, stated:

> "Indeed, the Appellant explicitly concedes, as he

must, the validity of voting requirements relating to residence, literacy, and age." (Emphasis supplied."

In fact, a close reading of this case lends to the conclusion that the "compelling state interest test" is not applicable to "rational" state residency requirements.

Sixth, Cipriano v. City of Houma, 395 U.S. 701 (1969), also deals with a limited purpose election in which the appellant did not challenge any other voter qualification regulations including residency. (Footnote 4-Id.) In dealing with the denial of the right to vote to otherwise qualified voters (including being qualified as to residency), this case is clearly distinguishable. The "compelling state interest test" was applied only to a denial of the right to vote after the voter had already qualified as to residency. The "compelling state interest" test, therefore, has never been applied to the fundamental state voting requirements of residency, age, and United States citizenship.

In conclusion, there is nothing contained in Appellants' "Equal Protection" argument to lessen the controlling force of Drueding in the instant case.

2. As to the "Privileges and Immunities" argument:

Appellants cite only two cases decided since Drueding, i.e., United States v. Guest, 383 U.S. 745 (1966); and Shapiro v. Thompson, 394 U.S. 618 (1969).

First, United States v. Guest, cited supra, is used repeatedly by Appellants for one purpose, and one purpose only, i.e., to establish the "right to interstate travel". This proposition is elementary, fundamental, and uncontested. Guest says nothing about the "de novo bootstrapping tie-in" which Appellants attempt in their brief, i.e., to say that because there is a right to travel there is also an automatic right to vote for President without any showing of state residence whatsoever. Guest, therefore, is authority for nothing comprising the gist of Appellants' argument.

Lastly, Shapiro v. Thompson, 394 U.S. 618 (1969), is relied upon heavily by Appellants in their Privileges and Immunities Argument.

Appellants contend that anything that serves to penalize the exercise of the right to travel is unconstitutional unless a compelling state interest is served, citing Shapiro v. Thompson, Id. We accept this as the holding of Shapiro. However, it is not applicable to the instant case for the following reasons:

1. We contend that Colorado's

voting residency requirement in no way violates Appellants' right to travel. Assume Appellant, being a graduate of an accredited law school, had to establish residency for a given period of time before taking the Colorado Bar Examination yet he wanted very much to live and practice his chosen profession in Colorado. Is the necessity of establishing residence for a given period of time before taking the Colorado Bar Examination an imposition on his right to travel to and establish residence in Colorado? The answer is obviously, NO, in that he is free to come to Colorado, but this does not mean that he is, ipso facto, immune from Colorado statutes involving residency prerequisites in certain selected areas. The right to vote in Colorado, therefore, is quite collateral to the right to travel to Colorado. Has Appellant, therefore, shown any nexus between the right to travel and the fact that he could not qualify to vote for President under Colorado's residency requirement? The answer is an unequivocal NO. Further, Colorado did not infringe his right to travel and establish residence here in any way, whatsoever. This is quite distinguishable from "a chilling effect on the right to travel" as enunciated by the majority of the Court in Shapiro.

2 One of the avowed purposes of the state residency requirements in the Shapiro cases was to discourage entry of the poor into the respective states.

> "We do not doubt that the one-year waiting period device is well suited to discourage the influx of poor families in need of assistance." 394 U.S. 618, 629.

Clearly there is no such purpose with respect to Colorado's two-month voting residency requirement. Colorado is not trying to "fence out" anybody with this law nor does it even serve to "fence out" anyone. Realistically, can Appellants show one concrete example of any person being discouraged from establishing residence in Colorado because of the Colorado two-month voting residency requirement? It apparently did not discourage the Appellants, themselves, from establishing residency here in 1968.

The compelling state interests supporting Colorado's two-month voting residency requirement have been set out at length, supra, in Section III. A, - "The Equal Protection Clause". Those compelling state interests are the rationale for our voting law, and are not analagous, in any way, to the States' rationale in the Shapiro cases.

3. Green v. Department of Public Welfare, 270 F.Supp. 173 (D.Del., 1967), cited in Footnote 1 of Shapiro v. Thompson, 394 U.S. 618, 622 as in Accord, specifically distinguishes Drueding, cited supra, in stating:

> "But certainly it takes little logic to conclude that the need for food, clothing and lodging has an aspect of immediacy which differentiates it in kind from the right to vote." 270 F.Supp. 173, at 178.

4. Shapiro v. Thompson, supra, affirmed Thompson v. Shapiro, 270 F.Supp. 331 (D.Conn., 1967), which also specifically distinguished welfare residency from voting residency by quoting Carrington v. Rash, 380 U.S. 89, 96 (1965):

> "Texas is free to take reasonable and adequate steps * * * to see that all applicants for the vote actually fulfill the requirements of bona-fide residence." 270 F.Supp. at 338.

Clearly, Appellants' attempt to analogize voting residency requirements with welfare residency requirements is like trying to compare the proverbial "apples with oranges".

5. Finally, Mr. Justice Brennan at 394 U.S. 638, Fn.21, states:

> "We imply no view of the validity of waiting-period or residence requirements determine eligibility to vote, eligibility for tuition-free education, to obtain a license

> to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the Constitutional right of interstate travel." (Emphasis supplied.)

Shapiro has been shown to be of no support for Appellants' attack on Colorado's two-month voting residency requirement.

In conclusion, there is nothing contained in Appellants' "privileges and immunities" argument to lessen the controlling impact of Drueding on the instant case.

B. Having disposed of Appellants' attacks on Drueding, we now move to the affirmative to show cases that have been decided since Drueding which support it, and, therefore, in turn support Appellees' position.

Van Berkel v. Power, 16 N.Y.2d 41, 261 N.Y.S.2d 876, 209 N.E.2d 539 (1965), is discussed above at page 27 of this brief. The Fourteenth and Fifteenth Amendments do not disable any appropriate governmental body from regulating suffrage where a legitimate state interest exists; the two amendments mean simply that the states and the federal government must exercise their powers so as not to discriminate between

their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. U.S. v. State of Alabama, 252 F.Supp. 95 (1966). The states have broad powers to determine conditions under which the right of suffrage may be exercised. Carrington v. Rash, 380 U.S. 89 (1965). A case that Appellants rely upon, Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), proclaims that the states have the power to fix voter qualifications within the constitutional framework. (Emphasis supplied.)

The Voting Rights Act of 1965, 42 U.S.C. 1971 et.seq. does not in any way strike down reasonable state legislation as to voting qualifications, including residency. The Voting Rights Act of 1965 is only applicable to invidious grounds of state action such as discrimination based on race, creed, or color. Residency is a fundamental positive requirement for voting in an area. Davis v. Gallinghouse, 246 F.Supp. 208 (1965). This case is extremely important because it construed the Voting Rights Act of 1965 with respect to state residency requirements. The U.S. District Court unequivocally upheld the residency requirements of the State of Louisiana by holding:

> "The Court finds that the requirement of proof of residence is reasonable as well as lawful and consonant with human dignity."

Further, the Court stated:

> "The Court finds no support for the argument that documentation of residence comes within the Voting Rights Act ban on tests and devices."

Clearly, therefore, state residency requirements do not come within the prohibitions of the Voting Rights Act of 1965.

In sum, it is readily seen that nothing in the law has changed since the Drueding affirmance by the Supreme Court of the United States in 1965. Drueding is therefore the law and controls the outcome in the instant case. Therefore, it is patently clear that the Colorado residence requirement of two months in order to qualify as a voter for President and Vice-President of the United States is not invidious, is reasonable under the Fourteenth Amendment, and is therefore constitutional.

CONCLUSION

For the foregoing reasons, it is urged that:

1. This appeal should be dismissed for mootness or,

2. If the appeal is decided on the

merits, then the judgment of the court below should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 39

RICHARD HALL and CHRISTINE HALL,
Appellants,

against

HARRIET BEALS, Clerk and Recorder of El Paso County, and BESS TITUS, Election Supervisor of El Paso County,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF *AMICUS CURIAE* FOR NEW YORK STATE ATTORNEY GENERAL IN SUPPORT OF APPELLEES

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IN THE

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF *AMICUS CURIAE* FOR NEW YORK STATE ATTORNEY GENERAL IN SUPPORT OF APPELLEES

Interest of *Amicus*

The instant case, involving the constitutionality of Colorado's durational residence period as a prerequisite to voting for that state's presidential electors, is of direct interest to the People of the State of New York. New York, by Constitution (Article II, § 9) and statute (New York Election Law, Article 14-a), has established a 90-day residence period for eligibility to vote for presidential and vice-presidential electors. Should appellants succeed in their challenge to durational residence requirements, the problems engendered by such a result would be particularly acute in New York which is the second most populous state in the union, incorporates the most populous

city in the nation and is a traditional host to persons from other parts of the country. The Attorney General of New York as the chief legal officer of the state (New York Executive Law § 63), is charged with the defense of state enactments (Executive Law § 71). He also has a special responsibility with respect to administration of the Election Law (Executive Law § 69). Accordingly, the Attorney General of the State of New York files this brief *amicus curiae* in support of appellees.

POINT I

A durational residence requirement as a prerequisite to voting for presidential and vice presidential electors is a reasonable exercise of the state's power to set voter qualifications.

A.

Appellants concede that a person who offers to vote for presidential and vice-presidential electors must be a resident of the state in which he offers to vote (Br. pp. 18 n. 3[a], 28). They challenge, however, the constitutionality of a requirement that he be a resident for a specific period of time before he becomes eligible to vote in such elections. Appellants appear to acknowledge that *some* length of time as a resident in the state can be required and ask this Court to fix such a period as a constitutional requirement. However, once it is conceded that some residence requirement may be imposed, there is no basis for a suggestion that the Constitution requires a two, three or six week period as opposed to a one or two, three or six month period of residence.*

* It should be pointed out the instant case may be moot since Colorado has altered its residence requirement to two months, a period with which appellants complied. Accordingly, the issues will not recur in their present posture (cf. *Moore* v. *Ogilvie*, 394 U. S. 814) and there is no party aggrieved before this Court. *Gohlen* v. *Zuckler*, 394 U. S. 103; *United Public Workers* v. *Mitchell*, 330 U. S. 75.

In imposing this durational residence requirement, the states are acting pursuant to the explicit authority of the United States Constitution, Article II, § 1, that the state legislatures direct a method of appointing electors for president and vice president. *McPherson* v. *Blacker*, 146 U. S. 1. Indeed, the state legislative power to control the appointment of electors is plenary in contrast to its power to regulate congressional elections. The latter power, while given to the states in the first instance, is subject to some control by Congress. U. S. Const. Article I, § 4; *United States* v. *Classic*, 313 U. S. 299. Because the establishment of voter qualifications is the province of the states (*Harper* v. *Virginia State Board of Elections*, 383 U. S. 663; *South Carolina* v. *Katzenbach*, 383 U. S. 301; *Carrington* v. *Rash*, 380 U. S. 89, 91; *Gray* v. *Sanders*, 372 U. S. 368, 379; *Lassiter* v. *Northampton County Board of Elections*, 360 U. S. 45, 50 [1959]; *Pope* v. *Williams*, 193 U. S. 621, 632 [1904]; *Minor* v. *Happersett*, 88 U. S. [21 Wall.] 162), examination of the validity of state voting requirements is confined to the question of whether "state voting qualifications or procedures . . . are discriminatory on their face or in practice" (*South Carolina* v. *Katzenbach*, *supra* at 325), within the meaning of either the Fifteenth Amendment (see e.g., *Guinn* v. *United States*, 238 U. S. 347, 366 [1915]) or the qual protection clause of the Fourteenth Amendment (*Harper* v. *Virginia State Board of Elections*, *supra*; *Carrington* v. *Rash*, *supra*).

No prerequisite for voting has received such long-term unqualified sanction as the residence requirement. Such requirements are "obvious examples indicating factors which the state may take into consideration in determining the qualifications of voters". *Lassiter* v. *Northampton County Board of Elections*, *supra* at 51. Residence requirements were directly sanctioned by this Court in *Drueding* v. *Devlin*, 234 F. Supp. 731 (D. Md. 1964), *aff'd* 380 U. S. 125 and *Pope* v. *Williams*, *supra*. Only last term in *Kramer* v. *Union Free School District*, 395 U. S. ——,

this Court, in examining other qualifications for voting in a local school district election, noted that it was applying a rigid scrutiny to "statutes denying the franchise to citizens *who are otherwise qualified by residence* and age. . . ." (Emphasis supplied).

Residence requirements such as the one in the instant case are not to be measured by the standard of whether they further a "compelling state interest" (*Kramer* v. *Board of Elections, supra*), but rather by whether or not they have a rational connection to a valid state purpose. *Lassiter* v. *Northampton County Board of Elections, supra.* This standard is clearly mandated by the decision of this Court in *McDonald* v. *Board of Elections*, 394 U. S. 802, rejecting the claim of an incarcerated prisoner awaiting trial that he was being unfairly denied an absentee ballot. As in that case, the provision here makes no discrimination on the basis of wealth or race and represents an attempt to *extend* the ballot to persons who might otherwise be disenfranchised. The fact that the statute does not cover all persons whom it might cover does not undercut its presumptive validity. Only one state does not provide for any residence requirement and Congress has itself provided a one-year requirement for voting in the District of Columbia. *Drueding* v. *Devlin, supra.*

Residence requirements have traditionally been upheld as furthering the legitimate interests of insuring that a voter is a member of the community in which he offers to vote, and is a member of an informed electorate (*Lassiter* v. *Northampton County Board of Elections, supra*) and in protecting the purity of the election process. *Burroughs* v. *United States*, 294 U. S. 534. Appellants do not dispute the legitimacy of these aims in general, but contend that since the election is national in character, length of residence in any one state is irrelevant and contend further that no appreciable period of time is required to insure the purity of the ballot. Contrary to appellants' contention, the "member of the community" factor is not

irrelevant even in national elections. Although appellants disclaim any intention to mount an attack in this Court on the electoral college system of selecting a president, their argument amounts to just that. This Court is not the forum for such an argument. As of this date, the president is not elected by individuals, but by states. U. S. Const. Art. II, § 1; Amendment XII. It is the electors elected by the voters of each state who determine who shall be president. Accordingly, a vote by a person in a state where that person is not a resident would serve to dilute the votes of the residents of the state, a result not countenanced by the Constitution.

Thus, even though most states now employ the short ballot, which lists the candidates for president and vice president rather than the names of electors and even though there are, indeed, national issues at stake in a presidential election which cut across state boundaries, these interests have been recognized by most states in shortening the period of residence required for voting for president and vice president. However, because voting is still by states, the states have a legitimate interest in protecting the franchise of their voters by insuring that the votes are cast only by persons with some ties to the state.

Appellants' disregard of the importance of the electoral system is most clearly evidenced by their presentation of figures reflecting the numbers of persons who allegedly were disenfranchised by residence requirements and their contention that these numbers would have been enough to change the result in two of our last three presidential elections. No attempt was made to analyze those figures in terms of the states in which those votes would have been cast and there is no demonstration that the results could have been changed at all. There are local and state interests at stake even in a national election which more than justify residence requirements. This is a fact of life clearly recognized in every campaign where candidates are,

almost without exception, chosen with a view to the area if not the state from which they come.

Not only do appellants totally ignore the electoral college system of selecting a president by states, but the result they argue for would make any efficacious registration procedures virtually impossible.

Whatever Colorado may provide with respect to special presidential ballots in terms of requiring registration only by the Friday before an election, a state like New York which provides that a special presidential ballot must be applied for no later than the fourth Tuesday prior to the general election (New York Election Law § 342) obviously has come to the legislative conclusion that at least that much time is needed to insure the purity of the ballot and to set up administrative procedures.* There would appear to be no constitutional difference between the nearly 30 days now provided by New York for registration for a presidential ballot and the 90-day residence requirement. In any event, not all of the possible applications for such ballots would be made at the last possible moment but between the 90 days prior to the election and the fourth Tuesday.

New York not only has the second largest population in the country and the largest city in the country, it also has one of the most mobile and fluctuating populations, being a traditional mecca for new residents and a center for transients from all parts of the country and indeed of the world. Thus, the possibility that there will be in New

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* The New York special provisions for voting for presidential electors are found in N. Y. Const. Art. II, § 9 and N. Y. Election Law §§ 340-41. These provide for eligibility to vote after residence in the State for ninety days. In 1967, the prior one year requirement for voting in other elections was amended to provide for eligibility after a three month residence in the State and County, City or village of residence. N. Y. Const. Art. II, § 1; N. Y. Election Law § 150.

York, on any given election day or in the few days preceding it, a vast number of non-residents is highly likely.

It would be physically impossible to screen such persons if they chose to offer to vote in New York just before any election. Therefore, the possibilities of double voting and of voting by non-residents would be extremely high and the possibility of unscrupulous abuse of the electoral process by the bringing in of numerous unregistered voters not at all theoretical. This is especially true under a system of voting by states since a small number of votes could alter the result in a state.* Indeed, this kind of fear was the genesis of many residence requirements, SCHMIDHAUSER, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 MICH. L. REV. 823, 828 (1963). The fact that no such abuse can be pointed to in the present day merely demonstrates that the requirements have served a useful purpose, not that they are not necessary.

Appellants suggest that the fact that a special presidential ballot must be applied for under oath with the sanction of perjury is sufficient to insure the purity of the ballot and that, therefore, no prior investigation is required. Certainly it is better to conduct any investigation before a ballot is issued than subsequently; an investigation requiring time is required for its conduct and for notifying a prior election district that application has been made in the new state. See New York Election Law § 342(e). In New York all investigations of a person offering to vote in a presidential election must be concluded by the seventh day before the election. Election Law § 342(d). The remaining time must be used in preparing lists and sending ballots so that they may be cast

* Abolition of the unit rule would not cure this problem but would merely limit it to some extent. In any event, the method of allocating electoral votes is not the issue here. See *Delaware v. New York*, 385 U. S. 895.

in time for the election. This administrative machinery is not unduly cumbersome. It is designed to protect purity of the ballot and is not at all calculated to prevent people who are eligible to vote from voting. The chaotic results of the abolition of the residence requirement purely from the administrative standpoint alone justify the imposition of such requirement. When coupled with the possibility of fraud the residence requirement obviously justifies the reasonable and, indeed, compelling state interest of having orderly elections free from abuse. *Cone Brothers Contracting Co.* v. *NLRB*, 235 F. 2d 37, 40 (5th Cir. 1956), *cert. denied* 352 U. S. 916.

Appellants suggest, as an alternative to a residence requirement, that they be permitted to establish residence based on the ties they form with the community which include taking employment, motor vehicle registration, school enrollment and other indicia of residence. This argument derives from the decision of this Court in *Carrington* v. *Rash*, 380 U. S. 89 (1965), decided the same day as *Drueding* v. *Devlin, supra*. *Carrington* provides no support for the suggestion. In the first place, petitioners in that case had more than satisfied the durational residence requirement of Texas and were seeking to rely on their roots in the community, established over that period of time to refute a statutory presumption that their military status made their ties dubious. Such limited use of the indicia of property does not support the constitutional requirement that they may be a substitute for durational residence requirements. Indeed, the whole concept that property and means qualifications be used to establish eligibility to vote is anathema to that right. *McDonald* v. *Board of Elections, supra; Harman* v. *Forssenius*, 381 U. S. 528. Moreover, the property investigation suggested by appellants would, on any large scale, consume at least as much time as a residence requirement itself and would in effect create a dual requirement for voting not presently contained in the law. Finally, many persons

move from one place to another without appreciable means of property and without the means to establish immediate objective roots in the area. They cannot afford cars or houses; they may not have children of school age; they may not take residence under a lease and would thus be unable to demonstrate residence except by length of stay.

The residence requirement as presently constituted, thus, is reasonably related to the legitimate state interests it is designed to further. There has been no suggestion that the requirement has been applied in any discriminatory fashion (*South Carolina* v. *Katzenbach, supra*).

B.

Appellants seek to bolster their attack on the residence requirement for voting by arguing that such requirement abridges their fundamental right to travel. This argument derives solely from the decision of this Court in *Shapiro* v. *Thompson*, 394 U. S. 618, and is designed to fall within the terms of that case. This procrustean effort is unavailing. It is hardly likely in the first place that the right to travel is more fundamental than the right to vote. The residence requirement which is directed by its terms solely to the franchise for reasons legitimately bearing on the exercise of the franchise can not be undercut because of an alleged tangential impact on another "right". The unyielding one year residence requirement struck down by this Court in *Shapiro* v. *Thompson* was found by this Court to have the explicit purpose of fencing out from the state a certain class of people. Other cases based on the right to travel have struck down provisions passed for the same reason. *Edwards* v. *California*, 314 U. S. 160; *United States* v. *Guest*, 383 U. S. 745, 757. There is no possibility of finding any such intention, expressed or implied, in the voter residence statutes. The attempt to find an indirect impairment of one right as a justification for overthrowing a valid requirement relating to another,

equally fundamental right. As untenable and, applied here, would be drastic violence to the whole structure of our existing electoral system.

C.

Similarly, the attempt by amicus Civil Liberties Union to characterize the right to vote as a First Amendment right and, therefore, somehow even more fundamental than this Court has declared it to be is an attempt to do indirectly what clearly cannot be done directly. These claims are not within the issues tendered by the parties and amicus cannot enlarge those issues. In any event, the arguments are equally untenable. While the right to vote is clearly related to First Amendment freedoms of speech and association, it is not one of those rights. Indeed, there are many valid instances of persons unable to vote for one reason or another whose right to free speech and free assembly cannot be infringed. See *Harper v. Virginia State Board of Elections*, 383 U. S. 663, 673 (Black, J., dissenting).

CONCLUSION

For the foregoing reasons the order of the District Court should be affirmed.

Dated: New York, New York, September 23, 1969

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No. 39

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OCTOBER TERM, 1969

RICHARD HALL, ET AL., APPELLANTS

v.

HARRIET BEALS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINION BELOW

The opinion of the three-judge district court (A. 15-26) is reported at 292 F. Supp. 610.

JURISDICTION

Appellants filed a complaint challenging Section 19-24-1 of the Colorado Revised Statutes (1963) on federal constitutional grounds (A. 1-6). A district court of three judges was convened pursuant to 28 U.S.C. 2281, 2284. The court's order refusing injunctive relief and dismissing the complaint was entered on October 30, 1968 (A. 15), and its opinion was handed down on November 28, 1968 (A. 15-26). Appel-

lants' notice of appeal to this Court was filed on December 13, 1968, and the Court noted probable jurisdiction on May 5, 1969 (394 U.S. 1011). Jurisdiction of this appeal rests on 28 U.S.C. 1253.

QUESTION PRESENTED

Whether, consistent with the federal Constitution, a State may lawfully require a period of residence within the State which an otherwise qualified citizen must satisfy before being allowed to cast a ballot for the electors of the President and Vice President of the United States.

INTEREST OF THE UNITED STATES

This litigation is of interest to the United States since it involves the process of choosing the head of the executive branch of the federal government. The case also concerns the United States because of the national commitment embodied in the Voting Rights Act of 1965, "to enlarge representative government," "to solicit the consent of all the governed," and "to increase the number of citizens who can vote." [1]

Estimates of the number of citizens excluded from participation in the presidential election process because of State residence requirements vary from two to eight million potential voters in each national election (see App. Br. 19, n. 2). Standing alone, that figure represents a serious challenge to the goal of facilitating the active participation of all citizens

[1] Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., p. 17 (Attorney General Katzenbach).

in the electoral process. When considered in light of the closeness of the popular vote in two of the last three presidential elections—*i.e.*, a 100,000-vote plurality for the winner in 1960 and a 400,000-vote plurality for the victor in 1968, the significance of these residence restrictions becomes quite clear.

Attorney General Mitchell recently reaffirmed the commitment of the federal government "to the policy that it is in the national interest to encourage as many citizens as possible to vote and to discourage the application of unreasonable legal requirements." [2] He proposed legislation which would authorize all otherwise qualified persons resident in a State before September 1 of a presidential election year to vote in that State, and would permit those moving to another State after September 1 to vote in the State of their previous residence. See H.R. 12695, S. 2507, Sec. 2(c), 91st Cong., 1st Sess.[3]

But the government's interest here simply is not the product of a concern that as many citizens as possible participate in the election of the President. It also reflects the mobility of our modern society and the fact that much of this movement is directly caused, or at least indirectly induced or facilitated, by the federal government. The transfer of civilian and military personnel needed to operate various government offices and

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[2] Hearings on Voting Rights Act Extension before Subcommittee No. 5 of the House Judiciary Committee, 91st Cong., 1st Sess., p. 219.

[3] See also H.R. 4793, S. 2165, 91st Cong., 1st Sess., and H.R. 10949, 90th Cong., 1st Sess., for similar legislative proposals.

installations, the hiring of persons to work for government agencies at places far removed from their homes, and even federal encouragement and participation in highway construction and other programs designed to improve the different modes of transportation, contribute to making the government responsible, in a rather direct way, for the disenfranchisement of many citizens who are unable to satisfy State residence requirements.[4]

STATEMENT

Appellants, on behalf of themselves and others similarly situated, brought this suit to enjoin the enforcement, execution and administration of Section 49–24–1 of the Colorado Revised Statutes (1963). That section provided, at the time the case was decided by the three-judge district court, that a citizen otherwise qualified to vote must have resided in the State not less than six months preceding an election of presidential and vice-presidential electors in order to be qualified to cast a ballot in that election.[5]

[4] Indeed, the Department of State has expressed a particular interest in this case insofar as it relates to its employees, and other American citizens, who reside abroad and often are frustrated in attempting to cast their ballots by residence restrictions and similar State-imposed limitations which effectively curtail the right of these individuals to vote freely in national elections.

[5] The applicable Colorado statute is reprinted in appellants' brief (p. 3). It was amended on April 23, 1969, however, after the decision below and subsequent to the filing of the jurisdictional papers in this Court, and now provides for a two-month residence period with respect to eligibility for voting in presidential elections, in lieu of the six-month period previously in effect (see App. Br. 3–4).

Appellants are a husband and wife who had moved from California to Colorado on June 15, 1968. They established residence in the State of Colorado by purchasing a home, taking permanent employment, registering their car with the Colorado Motor Vehicle Bureau and obtaining Colorado drivers' licenses. They became liable for Colorado taxes on the date they moved there. They both are over the age of 21 years and are citizens of the United States. They were registered to vote in California before moving to Colorado (A. 2–3).

Desiring to vote in the election of the President and Vice President of the United States held on November 5, 1968, appellants applied for absentee ballots from the State of California, but were refused them on the basis that they were no longer residents of that State. On or about August 1, 1968, appellants sought to register in Colorado in order to be able to vote in the 1968 presidential election. The Colorado election officials informed Mr. Hall that he and his wife would not be allowed to register to vote in that election because they failed to satisfy the six-month residence requirement. Pleas to the Secretaries of State of California and Colorado were unavailing.

Appellants then brought this action against the Clerk and Recorder and Election Supervisor of El Paso County (where they resided) in the federal district court for the District of Colorado. They sought a declaration that the pertinent Colorado statute was unconstitutional and an injunction against its enforcement. A district court of three judges was

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convened, pursuant to appellants' request. On October 30, 1968, the court entered a final judgment refusing the injunction and dismissing the complaint. The opinion of the court, handed down on December 2, 1968, concluded that the six-month Colorado residence requirement was "not so unreasonable as to amount to an irrational discrimination" (A. 24; 292 F. Supp. at 614). A direct appeal to this Court followed.

ARGUMENT

INTRODUCTION AND SUMMARY

1. At the outset, a question arises whether intervening events since the case was commenced make it an inappropriate vehicle for this Court to decide the issue tendered—the viability of residency as an effective limitation on the right of suffrage in presidential elections.

As noted in the Statement (see note 5, *supra*), in April 1969 (after the decision below) the Colorado legislature substituted a two-month residence requirement for the previous six-month requirement for voting in presidential elections. This case is not, however, like *Bell* v. *Maryland,* 378 U.S. 226, where the intervening legislative enactment, in effect, spoke to the very issue before this Court.[6] Thus, there is no reason

[6] In this regard, see *Gray* v. *Sanders*, 372 U.S. 368, where the Court held that the attack on Georgia's county-unit system of electing statewide officeholders was not mooted by an intervening determination to hold the election which had been enjoined on a popular vote basis. There the Court noted that "the voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing" (*id.* at 376). Compare *Rice* v.

here for a remand to the district court. It has already given its approval to the concept of a period of required residence. And, although it might be suggested that reconsideration in light of certain recent decisions of this Court (*e.g.*, *Williams* v. *Rhodes*, 393 U.S. 23, *Shapiro* v. *Thompson*, 394 U.S. 618, and *Kramer* v. *Union School District*, 395 U.S. 621) would be appropriate, such a course would serve little purpose, for almost certainly the matter would return here through another direct appeal by the losing party for review. See *Mills* v. *Alabama*, 384 U.S. 214, 218; *Avery* v. *Midland County*, 390 U.S. 474, 478. Since the case has been briefed in light of all the decisions of this Court which the lower court might consider, it is unlikely that a remand would aid the Court in its consideration of the issue here involved.

Nor, under this Court's decisions, is consideration of the constitutional question foreclosed because the election of November 1968 has been held. Appellants' constitutional challenge, arising from a denial of their right to vote in presidential elections, seeks to resolve the issue in order to avoid future denials of the same right to appellants and members of the class they represent by any of the 43 States which, in addition to Colorado, impose waiting periods based on residence of

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Sioux City Cemetery, 349 U.S. 70, where, as the Court recently pointed out in *Jones* v. *Mayer Co.*, 392 U.S. 409, 418, n. 21, "the statute that belatedly came to the Court's attention * * * reached precisely the same situations that would have been covered by a decision in this Court sustaining the petitioner's claim on the merits." See also *Hunter* v. *Erickson*, 393 U.S. 385, 388–389.

from 30 days to two years that apply to presidential elections (see App. Br. 40).[7]

2. The central question presented by this appeal is whether a State's imposition of a residence restriction on an otherwise qualified citizen's right to participate in the presidential election process conflicts with rights protected by the Federal Constitution. In the government's view, such residence restrictions impermissibly abridge rights of national citizenship, namely, the right to travel among the various States without suffering a penalty attributable solely to the

[7] That appellants are now fully qualified to vote in all elections controlled by Colorado does not negate the past denials or the potential of future denials of constitutional rights to those similarly situated. In *Moore* v. *Ogilvie*, 394 U.S. 814, 816, this Court recently spoke directly to this point. That case involved independent candidates for President and Vice President who had sought and were refused a place on the ballot in Illinois in the November 1968 election, pursuant to an Illinois statute which the Court in its decision declared unconstitutional in spite of the fact that there was no effective relief which could be awarded the plaintiffs. In rejecting the mootness argument, the Court concluded that, because the burden of the Illinois statute would be effective in future elections, the case presented a continuing controversy in the federal-state area regarding voting rights and was suitable for a decision on the merits. See also *McDonald* v. *Board of Election*, 394 U.S. 802. Moreover, in *Dreuding* v. *Devlin*, 380 U.S. 125, affirming 234 F. Supp. 721 (D. Md.), which involved the identical issue presented here, this Court's *per curiam* decision was rendered on March 1, 1965, well after the 1964 presidential election. Here the Colorado statute will operate with similar effects in the next presidential election and thus potentially give rise to suits resulting from future disenfranchisement. Moreover, even though appellants are now qualified to vote in Colorado, which makes their situation somewhat different from that in *Moore*, they might move again prior to the next presidential election and encounter the same difficulties in a new jurisdiction.

exercise of that right, and the right to participate in the selection of the chief executive of the federal government on an equal basis with all other citizens of a State. Only a compelling State interest could save a regulation that abridges these fundamental rights, and, insofar as presidential elections are concerned, we believe no such justification exists.

There is of course a need for a short period of time prior to any election during which, for administrative purposes, the voting lists are closed. That is not, however, a persuasive explanation for the kind of residence requirement involved in this case. Indeed, here Colorado has separately spoken to this problem, allowing registration up to three days before an election. We conclude that any substantial waiting period based on residence which deprives an otherwise qualified citizen of the right to vote in a presidential election is unjustified.

I. COLORADO'S RESIDENCE REQUIREMENT INFRINGES RIGHTS OF NATIONAL CITIZENSHIP PROTECTED BY THE CONSTITUTION

What is at stake here—we repeat—is only eligibility to vote in *presidential* elections. To be sure, that matter has typically been made subject to the same requirements as are applicable in other elections. But that is not the necessary pattern, as efforts at legislative amelioration of the problem of the transient citizen in some States attest. See Schmidhauser, *Residency Requirements for Voting and the Tensions of a Mobile Society*, 61 Mich. L. Rev. 823 (1963); see also App. Br. 38–41. And, at all events, there is no

constitutional justification for burdening presidential elections with whatever residence qualifications may be appropriate in more local affairs.

With respect to other elections, including congressional elections, the propriety of requiring a period of residence in the constituency has long been assumed. See, *e.g., Carrington* v. *Rash,* 380 U.S. 89, 91; *Lassiter* v. *Northampton Election Board,* 360 U.S. 45, 50–51; *Pope* v. *Williams,* 193 U.S. 621, 632–633. And this is arguably condoned by the Constitution itself, which provides that those electing Senators (Seventeenth Amendment) and Representatives (Art. I., Sec. 2) for the federal Congress in each State will have the qualifications prescribed for electors of the most numerous branch of the State legislature. But no comparable provision governs presidential elections, and the arguments tending to justify residence requirements on the ground that they ensure interested participation and familiarity with local candidates and issues have little force here. Whatever the legitimacy of demanding a period of residence as a prerequisite to voting in other elections, the same considerations do not necessarily control in the instant situation.

Nor is the result effected by the constitutional prerogative which the States enjoy to *appoint* presidential electors rather than conduct a popular election. U.S. Constitution, Art. II, Sec. 1.[8] That was settled, if

[8] Under the scheme of the Constitution which gives to the electoral college the direct authority to choose the President and Vice President, those voting in a presidential election actually select electors, and do not cast ballots for candidates for these offices, at least in theory. But that does not undercut the position here espoused. In most States electors are required, directly

not earlier, last Term in *Williams* v. *Rhodes*, 393 U.S. 23.[9] The rule here, as elsewhere, is that stated in *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663, 665: "[O]nce the franchise is granted to the electorate, lines may not be drawn [by the States] which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." See, also, *Cooper* v. *Aaron*, 358 U.S. 1, 16–17; *Gomillion* v. *Lightfoot*, 364 U.S. 339, 344–345. Thus, the question is whether there is any rational justification for requiring a period of

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or indirectly, to cast their votes for the candidates they have declared themselves for and are pledged to support, so that, in a real sense, the voters are casting a ballot in favor of a specific presidential candidate. See generally Kefauver, *The Electoral College: Old Reforms Take on a New Look*, 27 Law & Contemp. Prob. 188, 191 (1962); Heinlein, *Presidential Election Procedures*, 35 U. Cinc. L. Rev. 1 (1966). Indeed, most States now use the so-called "short ballot" in presidential elections, in which only the names of the actual candidates, and not the electors' names, are listed. See, *e.g.*, Kirby, *Limitations on the Power of State Legislatures over Presidential Elections*, 27 Law & Contemp. Prob. 495, 507–508 (1962); Comment, 21 Sw. L.J. 269, 273–274, n. 27 (1967).

[9] There the Court pointed out that, despite the broad language of Art. II, Sec. 1, regarding the authority of the States in determining the manner of selecting electors, "those granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution" (*id.* at 29). The Court concluded that "the power to select electors could [not] be exercised in such a way as to violate express constitutional commands that specifically bar States from passing certain kinds of laws" (*ibid.*), and "reject[ed] the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions" (*ibid.*). In sum, "no State can pass a law regulating elections that violates the Fourteenth Amendment's command" of equal protection of the laws (*ibid.*).

residence for voting in presidential elections; if not, considering the rights affected, the Constitution bars distinctions made on this ground.

A. THE RIGHT TO TRAVEL

Last Term in *Shapiro* v. *Thompson*, 394 U.S. 618, in declaring unconstitutional one-year residence requirements for eligibility for welfare assistance, this Court reiterated the holding of a number of previous decisions [10] that the right to travel freely among the several States is a fundamental right guaranteed and protected by the federal Constitution. And, significantly, the Court found it unnecessary to ascertain whether a significant number of persons were actually deterred from moving because of the residence requirement. The very fact that the requirement classified people on the basis of whether or not they had recently moved to the State, and denied them welfare benefits if they had, was held to impose an impermissible burden on the right to travel absent a com-

[10] *Passenger Cases*, 7 How. 283, 492; *Crandall* v. *Nevada*, 6 Wall. 35; *Williams* v. *Fears*, 179 U.S. 270, 274; *Twining* v. *New Jersey*, 211 U.S. 78; *Edwards* v. *California*, 314 U.S. 160; *Kent* v. *Dulles*, 357 U.S. 116, 125; *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Zemel* v. *Rusk*, 381 U.S. 1, 14; *United States* v. *Guest*, 383 U.S. 745, 757–758. In *Shapiro* the Court stated that it had "no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision" (394 U.S. at 630), noting that in previous cases it had been grounded on the Privileges and Immunities Clauses of Art. IV, Sec. 2, and the Fourteenth Amendment, on the Commerce Clause, and on the Due Process Clause of the Fifth Amendment (*id.* at 630, n. 8).

pelling governmental interest for such a waiting period (see 394 U.S. at 627, 638).[11]

A similar analysis seems applicable in the instant case. While it is unlikely that many people are actually discouraged from moving because they would lose the right to vote in a presidential election—and residence requirements here presumably have no such purpose—the fact is that not allowing a person to vote simply because he recently moved imposes a penalty on the exercise of the freedom to travel. Had appellants not taken advantage of the right to move from California to Colorado, they would have been allowed to vote for President, but because they moved, they were denied the franchise.

To be sure, there are factual distinctions between this case and *Shapiro*. Here the franchise is denied only if an individual moves to another State within a certain period immediately preceding a presidential

[11] While the Court in *Shapiro* said that it did not intend to imply any view as to the validity of residence requirements determining voter eligibility (394 U.S. at 638, n. 21), and even suggested in passing that there might be some justification for such requirements (*ibid.*), former Chief Justice Warren, with Mr. Justice Black's concurrence, pointedly expressed the view in dissent that (394 U.S. at 654): "Despite the fact that in *Pruneda* v. *Dorfin*, 380 U.S. 125 (1965), we affirmed an appeal from a three-judge District Court after the District Court had rejected a constitutional challenge to Maryland's one-year residence requirement for presidential elections, the rationale employed by the Court in these appeals would seem to require the opposite conclusion. If a State would violate equal protection by denying welfare benefits to those who have recently moved interstate, then it would appear to follow that equal protection would also be denied by depriving those who have recently moved interstate of the fundamental right to vote."

election, while the plaintiffs in *Shapiro* were penalized for moving, whatever the time. This difference, however, does not affect application of the principle. Nor does the fact that the residence requirement for voting, in most places, prejudice only those who move in presidential election years make the resulting injury *de minimis*. *Somewhat surprisingly*, reliable statistics indicate that as many as five million voters were disenfranchised in the 1968 presidential election by residence requirements similar to that of Colorado. That such large numbers of persons are effectively prevented from voting is of itself cause for serious concern. But the significance of residence requirements is made even more obvious when it is noted that the popular-vote margin in two of the last three presidential contests—in 1960 and 1968—was less than 400,000 votes.

A Delaware district court has indicated that the vital need of welfare benefits differentiates such cases from litigation challenging voting residence requirements. *Green* v. *Department of Public Welfare*, 270 F. Supp. 173, 178 (D. Del.). However, the emphasis which this Court has increasingly placed on the right to vote would seem to undermine any notion that that right is entitled to less protection than the right to receive welfare assistance.[12] Restrictions on the franchise are distinctly not favored and the burden is on those who erect such barriers to justify them with compelling reasons. *E.g.*, *Carrington* v. *Rash*, *supra*;

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[12] See, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370; *Wesberry* v. *Sanders*, 376 U.S. 1, 17–18; *Reynolds* v. *Sims*, 377 U.S. 533, 555; *Carrington* v. *Rash*, 380 U.S. 89, 96; *Katzenbach* v. *Morgan*, 384 U.S. 641, 652.

Kramer v. *Union School District*, 395 U.S. 621; *Cipriano* v. *City of Houma*, 395 U.S. 701. Because the right to vote is the essential political right preservative of all others,[13] and lies at the very core of our constitutional system,[14] the withholding of the franchise should plainly be viewed as a penalty, different in quality from the deprivation of the means to obtain food and shelter, but nonetheless a substantial interference with constitutional rights.

Here the Colorado statute, while placing no absolute prohibition on the right to travel—which was equally so in the *Shapiro* situation—in effect presented appellants with the choice of preserving either their right to travel freely[15] or their right to vote in the 1968 presidential election.[16] Such a statute, re-

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[13] *Yick Wo* v. *Hopkins*, *supra*; *Wesberry* v. *Sanders*, *supra*; *Katzenbach* v. *Morgan*, *supra*.

[14] *Reynolds* v. *Sims*, *supra*; *Carrington* v. *Rash*, *supra*; *Kramer* v. *Union School District*, *supra*.

[15] Appellant Richard Hall was moving from California after graduation from law school to Colorado in order to take up the practice of law. Thus, to have remained in California through November would have cost him over four months' salary and very likely would have resulted in delaying his admission to the Colorado bar. His wife, appellant Christine Hall, could have remained in California until November, but only by maintaining a separate residence from her husband there—with the expense and disruption of family life that would entail—for over four months.

[16] Although those 19 years of age who want to vote may in some respects be deterred in moving from Georgia to another State where the minimum voting age is 21, and a youthful driver may be deterred in moving to another State which issues licenses only to persons a year or two older, such restrictions do not fall into the category of penalties imposed solely because of the exercise of the right to travel. In this case and in *Shapiro* the penalty is imposed for one reason only—the ap-

quiring appellants to sacrifice one of their fundamental rights, gave them no effective choice at all. It should accordingly be viewed as imposing an unconstitutional burden on such individuals, so long as no compelling governmental interest is demonstrated by the State to justify this disparity in the treatment of old and new residents (*Shapiro* v. *Thompson*, *supra*, 394 U.S. at 634; see *infra*, pp. 18–21).

B. THE RIGHT TO PARTICIPATE IN THE PRESIDENTIAL SELECTION PROCESS

The offices of President and Vice President are federal positions which exist by virtue of the Constitution. See Art. II, Sec. 1; Twelfth Amendment. It has long been established that Congress may enact laws ensuring the proper conduct of the process by which presidents are chosen. See *Ex parte Yarbrough*, 110 U.S. 651; *Burroughs* v. *United States*, 290 U.S. 534. In upholding the right of Congress to prevent any interference with the right to vote for President and members of Congress, it has been determined that "the right to vote in federal elections is a privilege of national citizenship derived from the Constitution." *United States* v. *Original Knights of the Ku Klux Klan*, 250 F. Supp. 330, 353 (E.D. La.).[17] This Court itself, though

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plicant's not having resided in the State for a requisite period of time. Thus, appellants could not vote only because they were new residents. But a 19 year old Georgian or a young driver moving to another State is not deprived of the vote or a driver's license because he is a new resident, but simply because all persons—old and new residents alike—must be of a prescribed age to vote and to drive. Hence, he is not denied equal protection, and no penalty arising from the exercise of the right to travel is involved.

[17] Cf. *Ex parte Siebold*, 100 U.S. 371; *United States* v. *Mosley*, 238 U.S. 383; *United States* v. *Saylor*, 322 U.S. 385.

acknowledging that the Constitution entrusts to the States the function of conducting elections to fill federal offices and of prescribing qualifications for participation therein, has held that the right of participation is directly protected by the Constitution:

> [A]mong the rights and privileges of national citizenship recognized by this court are * * * the right to vote for National officers * * * [*Twining* v. *New Jersey*, 211 U.S. 78, 97.]

And, of all the federal officials selected, the preeminent place of the right to choose the President is obvious. See *Burroughs* v. *United States*, *supra*, 290 U.S. at 545; cf. *Pope* v. *Williams*, 193 U.S. 621, 633.

As discussed earlier (*supra*, pp. 9–12), neither the selection procedure for presidential electors nor the proper limits of a State's authority to control the eligibility of voters is spelled out in the Constitution. Nonetheless, the two offices involved are constitutionally created and it is a right of national citizenship to be allowed to participate in the selection of persons to fill them. The federal right involved, of course, no more than the right to participate on an equal basis in the process by which the electors in a given State are chosen, but the fact that the States may employ a selection method other than popular vote does not change the essential nature of the right.

Constitutional protection thus does not disappear "simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment [rather than popular election]" (*Kramer* v. *Union School District*, *supra*, 395 U.S. at

628–629; *Harper* v. *Virginia Bd. of Elections, supra,* 383 U.S. at 665; compare *Sailors* v. *Board of Education,* 387 U.S. 105, 108–109; *Fortson* v. *Morris,* 385 U.S. 231, 233). Once a State chooses the method to be used and that method involves popular participation, the right to participate in that process, so far as the election of the President and other federal officials is concerned, is an aspect of national citizenship. Cf. *United States* v. *Classic,* 313 U.S. 299; *Smith* v. *Allwright,* 321 U.S. 649; *Terry* v. *Adams,* 345 U.S. 461. Viewed in that posture, the right asserted here is even more entitled to federal constitutional protection than the right not to be discriminated against in receiving welfare assistance as a result of interstate movement that was involved in *Shapiro.*

II. COLORADO'S RESIDENCE REQUIREMENT IS NOT SUPPORTED BY A COMPELLING STATE INTEREST

In judging the validity of the waiting period for welfare benefits, the Court in *Shapiro* held that the right to travel was a fundamental right guaranteed by the Constitution and that such rights could not be burdened by the States unless there was a "compelling" reason for so doing (394 U.S. at 638):

> Thus, even under traditional equal protection tests a classification of welfare applicants according to whether they have lived in the State for one year would seem irrational and unconstitutional. But, of course, the traditional criteria do not apply in these cases. Since the classification here touches on the fundamental

> **right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest. Under this standard, the waiting period requirement clearly violates the Equal Protection Clause.**

Because both the right of interstate travel and the right to participate in the selection process for presidential electors are aspects of national citizenship rooted in the Constitution, Colorado has an extremely heavy burden in seeking to justify its imposition of a residence requirement whose effect is to disenfranchise new residents such as appellants. Like the States in *Shapiro,* Colorado has failed to carry this burden, and its residence requirement accordingly "creates a classification which constitutes an invidious discrimination denying [appellants] equal protection of the laws" (394 U.S. at 627).

The purposes of the Colorado residence requirement, as explicated in several decisions by the Colorado Supreme Court, are the preservation of the purity of elections and the prevention of control of State affairs by persons who have no pecuniary interest in them (see A. 24). As the district court noted, the latter purpose is clearly inapplicable to the situation involved in the instant case, which concerns voting only in a presidential election (*ibid.*). So, also, the related notion that the voter should have an immediate familiarity with State and local issues simply has no significance with respect to voting for the President and Vice President, particularly in view of the extensive nationwide coverage given presidential elec-

tion campaigns by the news media and the "national community" that those leaders serve. Moreover, serious constitutional problems would arise if a substantial period of residence were demanded with the object of restricting the ballot to those who, through exposure to the special interests of the State, had become imbued with a particular point of view. See, *e.g.*, *Carrington* v. *Rash*, *supra*, 380 U.S. at 94; *Williams* v. *Rhodes*, *supra*, 393 U.S. at 30–31; *Cipriano* v. *City of Houma*, *supra*, 395 U.S. at 705–706.

As regards a State interest in preserving the purity of elections, the residence restriction does not appear to contribute significantly to efforts to prevent voting fraud and corruption. In Colorado, for example, there is apparently no cross-checking of those who meet the residence requirement to ensure that they have not voted by absentee ballot, or otherwise, in the State of their former residence. The residence requirement itself provides no sanctions for such double voting; the only available sanction, that of perjury, would apply even without the residence requirement. In *Shapiro* the Court was confronted by similar arguments in support of the residence requirement for welfare assistance, but concluded that other less drastic means were available to accomplish that purpose, as similarly exist in the instant case. Thus, this consideration, even if not insubstantial, hardly constitutes a compelling State interest so as to justify the statute as against challenge under the Equal Protection Clause.

While the Colorado statute provided that one must have resided in the State for six months—now shortened to two months—prior to the election in order to

be eligible to vote, one who meets the residence requirement can presumably present himself to the registrar as late as the Friday before the election and become a registered voter for purposes of the presidential contest. See Colorado Revised Statutes, Sec. 49–24–3 (1963). Of course the States may justifiably desire to set some cutoff date for registration in order to facilitate the necessary administrative procedures incident to conducting an election. Three days—including only one working day—has apparently been determined by Colorado to constitute a sufficient period of time within which to handle the administrative details related to closing and revising the voting rolls. It seems clear, then, that the statute prescribing the residence requirement does not serve any such purpose, but rather establishes an arbitrary waiting period which serves no governmental interest that can in any respect be characterized as compelling.

Finally, the decision in *Drueding* v. *Devlin,* 234 F. Supp. 721 (D. Md.), affirmed, 380 U.S. 125, does not stand as an obstacle to the Court's reaching the conclusion that the Colorado residence requirement is unconstitutional. Although, in that case, the Court upheld a one-year residence requirement for voting for presidential electors imposed under Maryland law, the district court's opinion, which was affirmed *per curiam* and without opinion, reasoned that "the real question" in the case was whether the statute is "so unreasonable as to amount to a prohibited discrimination" (234 F. Supp. at 724). In view of the Court's recent repeated articulation of a more stringent constitutional standard in voting and right to travel

cases (*e.g., Shapiro* v. *Thompson, supra; Kramer* v. *Union School District, supra; Cipriano* v. *City of Houma, supra*)—*i.e.*, whether the statute is justified by a compelling governmental interest—the basis of the holding in *Drueding* has already been seriously undermined.

Reliance here by the district court (A. 23–25) on the ordinary equal protection test of whether a State legislative determination is wholly without a reasonable foundation (*e.g., McGowan* v. *Maryland*, 366 U.S. 420) is entirely misplaced. That standard is not applicable in voting and right to travel cases; *a fortiori*, it is inapposite where *both* the right to vote and the right of interstate travel are involved, as here, in the same case. Rather, the pertinent test is whether the distinction made or different treatment accorded individuals otherwise similarly situated reflects some "compelling State interest" so as to withstand rigid constitutional scrutiny. Here the district court, relying on *Drueding*, applied the wrong standard in concluding that the Colorado residence requirement was "not so unreasonable as to amount to an irrational discrimination" (A. 24). As this Court recently stated in *Kramer* v. *Union School District, supra*, 395 U.S. at 626–627, a voting case, in language tracking the standard enunciated for right to travel cases in *Shapiro:*

> Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide

> residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest. * * *

Neither the Colorado statute, nor indeed the Maryland statute involved in *Drueding*, can withstand application of the "compelling state interest" test. Accordingly, in burdening appellants' right to travel and impairing their right to vote in a presidential election without sound justification, the Colorado statute, by arbitrarily discriminating against them and others like them, violates the Equal Protection Clause.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and this Court should hold the Colorado residence requirement unconstitutional.

Respectfully submitted.

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OCTOBER TERM, 1969

No. 39

RICHARD HALL AND CHRISTINE HALL
APPELLANTS,

v.

HARRIET BEALS, CLERK AND RECORDER OF EL PASO COUNTY, AND BESS TITUS, ELECTION SUPERVISOR OF EL PASO COUNTY,
APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF AMICUS CURIAE FOR HARVEY M. BURG IN SUPPORT OF APPELLANTS

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In the
Supreme Court of the United States

OCTOBER TERM, 1969

No. 39

RICHARD HALL AND CHRISTINE HALL,
APPELLANTS,

v.

HARRIET BEALS, CLERK AND RECORDER OF EL PASO COUNTY, AND BESS TITUS, ELECTION SUPERVISOR OF EL PASO COUNTY,
APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF AMICUS CURIAE FOR HARVEY M. BURG IN SUPPORT OF APPELLANTS

PART I

Interest of Amicus Curiae — Effect of HALL on Amicus

Amicus, plaintiff in *Burg et al v. Canniffe et al*, case number CA 69-855-C, presently being considered by a Three-

Judge Court of the United States District Court for the District of Massachusetts, has a direct interest in the outcome of *Hall* v. *Beals*. Amicus was denied the right to vote in a Congressional election for the United States House of Representatives because of his failure to comply with durational residence requirements under Massachusetts law. The Three-Judge Court sitting in the *Burg* case issued a continuance which specified that the Court would not decide *Burg* until the United States Supreme Court decided *Hall* v. *Beals*. A copy of that order appears herein as Exhibit "A".

Amicus is filing this Brief to apprise the Court of the circumstances and facts of the Massachusetts case so that the Court may duly consider the effect its ruling in *Hall* v. *Beals* will have upon the Massachusetts case. Amicus does not possess sufficient factual knowledge of the Colorado case to recommend a ruling therein with a reasonable degree of certainty. Amicus actually received its Court Order less than one week ago. However, amicus believes that it can contribute to the Court's effort to decide *Hall* v. *Beals* by discussing the law which should be applied to the Colorado question.

Amicus' case, a class action requesting declaratory and injunctive relief, challenges the constitutionality of Amended Article III of the Constitution of the Commonwealth of Massachusetts and its statutory analogue M.G.L.A. c. 51, Sec. 1 (copies of which appear herein as Exhibit "B") which contain the durational residence requirements imposed upon would-be voters in the Congressional election within the Commonwealth. According to the laws of the Commonwealth, proof of domicile is *per se* insufficient to qualify an individual to vote in federal and state elections.

Rather, persons after establishing all other incidents of residency or domicile, must reside within the Commonwealth for one year and in the city or town wherein they seek to vote for six months next preceding an election.

In *Burg* v. *Canniffe*, *supra*, the plaintiff although residing six months within the Town of Marblehead, had not resided one year within the Commonwealth of Massachusetts when he attempted to register to vote in the special Congressional Election and a Primary preliminary thereto. At plaintiff's request, the Court granted interim relief to plaintiff and members of his class pending final decision on the merits. See Exhibits "C" and "D" hereto.

Burg was argued before the Three-Judge Court on September 19, 1969. Although no testimony was permitted, the facts asserted by plaintiffs were taken as well pleaded and the case was argued on its merits. Amicus sets out material facts in its own case for the Court's consideration for comparative purposes.

In Amicus' case, plaintiffs alleged material facts to be as follows:

1. Registration is permitted up to thirty-one and in some cases twenty days preceding an election. See M.G.L.A. c. 51, Sec. 26.

2. Neither one year nor six months is *in fact* required by Boards of Registrars in the Commonwealth to administer the statute, preserve the purity of elections, or insure intelligent exercise of the right to vote. The Board of Registrars of the Town of Marblehead had no procedure for investigating registration applicants other than checking lists of residents compiled every year on or about the first of the year. If an applicant's name did not appear thereon,

the Board would register the individual upon that person's execution of an affidavit, a specimen of which appears herein as Exhibit "E".

3. In Presidential elections the Commonwealth of Massachusetts has acknowledged the lack of compelling governmental interest to require a durational waiting period once domicile for other state purposes is established. The Commonwealth permits a person, otherwise qualified, to *vote* for Presidential and Vice Presidential elections after being domiciled in Massachusetts for 31 days and upon the execution of an affidavit, a reproduction of which is attached hereto as Exhibit "F". See M.G.L., c. 51, Sec. 1A.

4. At least 75,000 persons 20 years of age and older probably moved into the state of Massachusetts between March 15, 1968 and March 15, 1969, according to expert testimony which plaintiffs offered to present to that Court.

5. Plaintiffs in Massachusetts, as are Colorado domiciliaries, are subjected to the obligations of citizen-domiciliaries upon actually residing 30 days within the Commonwealth. Motor Vehicles must be registered, income and inheritance taxes must be paid, children must be sent to schools, etc.

In *Burg* plaintiffs challenge the constitutionality of a durational requirement of one year. The Massachusetts statute also discriminates against plaintiff in that plaintiff by moving to Massachusetts from out of state, must wait six months longer to vote in his town than a similarly newly arrived domiciliary to the town who moved from another district, but somewhere within the Commonwealth's borders. The Court in *Burg* may only grant relief to plaintiffs on the basis of this discrimination. Either way, the Three-Judge Court is looking for guidance in terms of law and its application to the facts.

PART II

The Colorado law must be declared unconstitutional unless it withstands Judicial Scrutiny under the "Compelling Governmental Interest" test.

Durational residency requirements which constitute a condition precedent to the exercise of the vote in either Presidential or Congressional elections necessarily invade several fundamental rights protected by the United States Constitution. By denying certain individuals the opportunity to cast a ballot, the State is restricting the exercise of a fundamental political and constitutional right. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370; *Reynolds* v. *Sims*, 377 U.S. 533, 561; *Harper* v. *Virginia State Bd. of Electors*, 383 U.S. 663, 670; *Carrington* v. *Rash*, 380 U.S. 89, 96; see also *United States* v. *Classic*, 313 U.S. 299, 314-315.

Moreover, the right to vote in federal elections is protected by the First Amendment. *Hadnott* v. *Amos*, 394 U.S. 358; See, *Brief* of Amicus Curiae American Civil Liberties Union pp. 4-12 filed in this case.

A state statute which denies the right to vote to those United States citizens who choose to move interstate denies, chills, burdens or penalizes the constitutionally protected freedom to travel across interstate borders throughout this Nation. Although the derivation of the right to freely travel is a question of some dispute, it has been well settled that the right is of constitutional stature. *United States* v. *Guest*, 383 U.S. 745, 758; *Edwards* v. *California*, 314 U.S. 160; *Shapiro* v. *Thompson*, 37 U.S.L.W. 4333 (April 21, 1969). Clearly, one who is considering changing his domicile is forced by most, if not all, state durational residency statutes to choose between the assertion of one constitutional guarantee at the expense of giving up another —the right to vote for the right to travel interstate and

establish residency in a new state. Either right may be exercised only if the other is surrendered. A forced selection between two constitutional rights, indeed, chills, burdens and penalizes the right which is eventually exercised, and, in fact, denies the right which is foregone. This Court has firmly established that an individual has a right to travel without being subject to these encumbrances. *Shapiro v. Thompson, supra.*

Furthermore, forcing an individual to choose one constitutional right at the expense of another is, in itself, an infringement of that individual's right not to be forced to so choose. A state statutory and or constitutional scheme which compels an individual to relinquish one constitutional right in order to preserve another "whipsaws" that individual and thereby affronts the dictates of Due Process. See *United States v. Jackson*, 390 U.S. 570. As this Court declared in *Aptheker v. Secretary of State*, 378 U.S. 500, 507:

> The restrictive effect of the legislation cannot be gainsaid by emphasizing, as the government seems to do, that a member of a registering organization could recapture his freedom to travel by simply in good faith abandoning his membership in the organization. Since freedom of association is itself guaranteed by the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given organization.

Accord, *Shapiro v. Thompson, supra.*

By subjecting the interstate traveler to infringements on his rights to vote, to travel, and to not be "whipsawed",

Colorado, Massachusetts, and every other state in the Union treats one class of individuals (those who travel interstate and who cannot vote for reason of durational residency requirements in federal elections) differently from another class of citizens (those who do not travel interstate and can vote in federal elections). This difference in treatment by the states is subject always to the standards of Equal Protection of the Fourteenth Amendment.

However, when a statute treats individuals differently by denying constitutional rights to one, and affording them to another, this Court has supplemented an older, less exacting, less scrutinizing test of constitutional compliance — which required a mere showing of a rational or reasonable relationship between the statutory classification and the end sought by the legislation (which must be deemed to have a legitimate purpose). *Harper* v. *Virginia Bd. of Elections, supra.* Instead, today, this Court holds that when a party seeks to exercise a fundamental constitutional right, such as the rights to vote and to travel, any statutory classification which serves to proscribe or penalize these rights is unconstitutional unless it meets the exacting standards developed by this Court and characterized by parties and amicus as the "compelling governmental interest" test. See, *Shapiro* v. *Thompson, supra*; *Williams* v. *Rhodes*, 393 U.S. 23; *Kramer* v. *Union Free School District*, 37 U.S.L.W. 4530 (June 16, 1969); and *United States* v. *Jackson, supra.* Briefly, the so-called "compelling governmental interest" doctrine developed in these cases requires the following questions to be asked:

> (a) Does the statutory classification deny, chill, burden, or penalize the assertion of a constitutionally protected right?

(b) Is the purpose sought to be achieved by the statute legitimate or permissible?

(c) Is there a compelling governmental interest to which the state has addressed itself?

(d) Are the restrictions or classifications imposed necessary to serve the compelling governmental interest?

(e) Are the restrictions sufficiently tailored, i.e., drawn so that they are not overbroad?

(f) Are there other alternatives by which the governmental interest can be achieved without invading the constitutionally protected right?

A statute which by its classification denies, chills, burdens, or penalizes the assertion of a constitutionally protected right can only pass constitutional muster if:

(1) The purpose of the statute is constitutionally legitimate or permissible; and

(2) The statute serves a compelling governmental interest; and

(3) The restrictions or classifications are in fact necessary to serve the compelling governmental interest; and

(4) The restrictions are sufficiently tailored and not overbroad; and

(5) There are no other alternatives by which the governmental interest can be achieved without invading constitutionally protected rights.

The application of these standards is based upon a factual analysis of the circumstances presented. *Williams v. Rhodes*, *supra*, at p. 30.

Amicus is not familiar with the circumstances relevant to the Colorado two month durational residency require-

ment. However, in amicus' case, the Massachusetts statutory and constitutional requirements do not fulfill the standards employed by this Court and, are, therefore, unconstitutional. Whether or not the purpose of the statute is legitimate is subject only to conjecture. But, assuming legitimacy, and assuming a compelling governmental interest, one year is longer than necessary to achieve any goals sought by Massachusetts (e.g. prevention of fraud, administrative necessity, etc. etc.). Indeed, Massachusetts apparently admits this by requiring 31 days residency for presidential elections. Therefore, the statute is not sufficiently tailored as required in *Kramer*, *supra*. In addition, there are other alternatives available to the state to achieve its aims—criminal statutes to deter fraud, and the use of tax rolls, automobile registration, place of employment and residency, as well as sworn affidavits by a prospective voter as to his domicile to determine whether an individual is a bona fide domiciliary of a state and district. See *United States* v. *Jackson*, *supra*.

Amicus believes that a state's interest in an individual's knowledge of, familiarity with, and sharing in local interests with, is not a permissible governmental interest. See Amicus Curiae Brief of American Civil Liberties Union, pp. 27-28. Amicus is aware that the states are granted the authority to determine voter qualifications through the United States Constitution. However, this Court has often stated that a State cannot exercise its authority in a manner which contravenes the other provisions of the Constitution. See *Katzenbach* v. *Morgan*, 384 U.S. 641, 647 and cases cited therein. *Harper* v. *Virginia Bd. of Elections*, *supra*; *Carrington* v. *Rash*, *supra*. See also *United States* v. *Mississippi*, 380 U.S. 128; *Louisiana* v. *United States*, 380 U.S. 145, 151; *Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45; *Pope* v. *Williams*, 193 U.S. 621, 632-634; *Minor* v. *Happersett*, 21 Wall. 162). Cf. *Bacus* v. *Richardson*, 384

U.S. 73, 92.]; *Reynolds* v. *Sims*, 377 U.S. 533. Accordingly, when the state exercises its authority through Article II, Section 1, and Article I, Section 2, and invades areas of constitutionally protected freedoms, this Court must scrutinize that invasion by an exacting factual analysis pursuant to the standards developed by this Court.

PART III

HALL and BURG in context — Similarities and Differences

The plaintiffs in Burg have argued that decisions of this Court subsequent to *Drueding* v. *Devlin*, 234 F. Supp. 721 (D. Md. 1964), aff'd per curiam, 380 U.S. 125 (1965) have changed the standard to be applied in determining the constitutionality of a durational residency requirement imposed by a state as a qualification for voting in an election, from "reasonableness" to "compelling state interest". Under the latter test, the burden is on the state to demonstrate that its durational residency requirement is in fact necessary for the purposes to be accomplished and is sufficiently tailored so as not to infringe more than is necessary on the right to vote. The plaintiffs have argued that the durational residency requirement in Mass. G.L. c. 51, Sec. 1, and Amended Article III of the Massachusetts Constitution is unconstitutional as an infringement on their rights to vote and to travel from one state to another. Thus, in respect to the theories relied upon by the respective plaintiffs, *Hall* v. *Beals* is similar to *Burg* v. *Canniffe*. However, there are important differences, which the Court should bear in mind in deciding *Hall*.

First, the portion of the Constitution which is interpreted as giving the states the power to determine the qualifications of voters in a presidential election is Article II, Section 1. In fact, the section does not make an

explicit grant of this power." In *Burg*, the relevant portion of the Constitution is Article I, Section 2, which requires that persons voting for the House of Representatives "have the qualifications requisite for electors of the most numerous branch of the State legislature." The latter section raises questions of federalism and accommodation between state and federal interests which do not seem to be present in the language of Article II, Section 1.

Second, each case involving the constitutionality of a durational residency requirement and thus requiring the Court to apply the "compelling state interest" test must be decided on its own facts. The length of the durational residency requirement, which is either six months or two months in *Hall* and one year in *Burg*, is only one factor to be considered among others. A durational residency requirement which is constitutional for a congressional election in Massachusetts may not be constitutional if applied to a presidential election or even to a congressional election in New York. Furthermore, neither *Hall* nor *Burg* involves durational residency requirements for voting in [redacted] county or municipal elections. The constitutionality of a durational residency requirement in a local election may involve very different issues of law and fact from the same questions arising in an election for a federal office. In deciding *Hall*, which involves a short residency requirement, the Court should be careful not to foreclose challenges of durational residency requirements presenting different facts, issues and evidence.

Third, the durational residency requirements in Mass. G.L. c. 51, Sec. 1, and Amended Article III of the Massachusetts Constitution, which are incorporated into Article I, Section 2, of the Constitution, treat persons moving into a city or town in Massachusetts from another state differently than they do persons moving from one city or town

within the Commonwealth to another such city or town. The plaintiffs have alleged in their complaint that this difference in treatment discriminates against persons moving into Massachusetts from another state and therefore violates the Equal Protection clause of the Fourteenth Amendment of the federal Constitution. This feature of Massachusetts law involved in *Burg* is without parallel in the Colorado statute involved in *Hall*, and hence the issue of discrimination in applying a durational residency requirement is not before the Court in *Hall*.

In conclusion, while *Burg* and *Hall* may involve certain common questions, there are significant differences between the cases. The Court should consider these differences in deciding *Hall* in view of the order of the Three-Judge court in *Burg*, which is Exhibit "A".

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EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 69-865-C

HARVEY M. BURG,
individually, and on behalf of all
others similarly situated

v.

JAMES E. CANNATTE, ET AL.

ORDER

September 26, 1969

It appearing that the case of *Hall* v. *Beals*, 292 F. Supp. 610 (D.C. Colo. 1968), presents similar issues to those involved in the instant case, and it further appearing that the Supreme Court of the United States has noted probable jurisdiction in *Hall* v. *Beals*, which is now No. 39 on the 1969-70 Appellate Docket of the Supreme Court of the United States, it is hereby

ORDERED that the instant case be continued until further order of this court.

(s) EDWARD M. MCENTEE
U.S. Circuit Judge

(s) ANDREW A. CAFFREY
U.S. District Judge

(s) HUGH H. BOWNES
U.S. District Judge

EXHIBIT B

Amend. Art. 3 Constitution of Massachusetts

Art. III. Qualifications of voters for governor, lieutenant governor, senators and representatives

ART. III. Every citizen of twenty-one years of age and upwards, excepting paupers and persons under guardianship and persons temporarily or permanently disqualified by law because of corrupt practices in respect to elections who shall have resided within the commonwealth one year, and within the town or district in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant governor, senators, or representatives, shall have a right to vote in such election of governor, lieutenant governor, senators and representatives; and no other person shall be entitled to vote in such election.

M.G.L., c. 51, Sec. 1

QUALIFICATIONS OF VOTERS.

SECTION 1. Except as otherwise provided in section one A, every citizen twenty one years of age or older, not being a pauper or person under guardianship and not being temporarily or permanently disqualified by law because of corrupt practices in respect to elections, who can read the constitution of the commonwealth in English and write his name, and who has resided in the commonwealth one year and in the city or town where he claims the right to vote six months last preceding a state, city or town election, and who has complied with the requirements of this chapter, may have his name entered on the list of voters in such city or town, and may vote therein in any such election or, except in so far as restricted in any town in which a representative town meeting form of government has been es-

tablished, in any meeting held for the transaction of town affairs. No other person shall have his name entered upon the list of voters or have the right to vote; except that no person who is prevented from reading or writing as aforesaid by a physical disability, shall, if otherwise qualified, be deprived of the right to vote by reason of not being able so to read or write; and no veteran if otherwise qualified to vote, shall be disqualified therefrom on account of receiving or having received aid from any city or town; and no person otherwise qualified to vote for national or state officers shall, by reason of a change of residence within the commonwealth, be disqualified from voting for such officers in the city or town from which he has removed his residence until the expiration of six months from such removal. A married woman shall be eligible to vote and to register for the purpose of voting in the city or town where she resides.

No person who actually supports himself and his family shall be deemed to be a pauper under this section by reason of the commitment of his wife, child or other relative to a state hospital or institution of charity, reform or correction by order of a court or magistrate, and of his inability to maintain such person therein; or who, to the best of his ability, has attempted to provide for himself and his dependents and has not been a mendicant, and who, through no crime or misdemeanor of his own, has come into grievous need and receives aid or assistance.

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 69-855-C

HARVEY M. BURG,
individually, and on behalf of all
others similarly situated

v.

JAMES E. CANNIFFE, CHARLES T. KELLEY,
JACQUELINE G. WILLIAMS, BETTY J. BROWN,
all members of the Board of Registrars of the
Town of Marblehead

ORDER
August 25, 1969

WYZANSKI, *Chief Judge*

Defendants are ordered to supply on primary and election days to the Clerk of the United States District Court a single copy of a ballot on each day, and on those days, plaintiff, if he wishes, may come to the clerk's office to mark the ballot on each occasion, to seal it, and to deliver it to the clerk.

(s) CHARLES E. WYZANSKI, JR.
Chief Judge

By the Court,
(s) RUSSELL H.
Clerk.

EXHIBIT D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 69-855-C

HARVEY M. BURG,
individually, and on behalf of all
other similarly situated
v.
JAMES E. CANNIFFE, ET AL.

ORDER

September 26, 1969

Defendants, Canniffe, Kelley, Williams, and Brown, are ordered to supply to the Clerk of this Court on or before Election Day, Tuesday, September 30, 1969, a ballot for the special election in the Sixth Massachusetts Congressional District, for plaintiff, and, if requested, a ballot for anyone else similarly situated.

Plaintiff, or anyone else similarly situated, may come to the Clerk's office, Room 1525, United States Courthouse, Boston, on Tuesday, September 30, 1969, to vote, to seal the ballot in an envelope, and to deliver it to the Clerk, who shall impound it pending further order of the Court.

(s) EDWARD M. McENTEE
U.S. Circuit Judge
(s) ANDREW A. CAFFREY
U.S. District Judge
(s) HUGH H. BOWNES
U.S. District Judge

EXHIBIT E

EXHIBIT F

THE COMMONWEALTH OF MASSACHUSETTS
SECRETARY OF THE COMMONWEALTH

Partial Ballot Application

, hereby make application to qualify for voting for electors for president and vice president only, as authorized by section one A of chapter fifty one of the General Laws at the election to be held in the city or town of on November , 19 .

I do solemnly swear that I now reside at in the city or town of in the Commonwealth of Massachusetts; that I have resided in the Commonwealth of Massachusetts since ; and that, immediately previous to coming to the Commonwealth of Massachusetts to reside, I resided at in the city or town of in the state of , where I was a qualified voter or where I would have been eligible to qualify as a voter but I remained at such residence.

(If applicant is a person not in active military service and is living on land within the Commonwealth of Massachusetts purchased by or ceded to the United States government, the following statement is to be made in lieu of the foregoing:

I do solemnly swear that I am not in active military service and that I am now living on land located within the limits of the city or town of which has been purchased by or ceded to the United States government, and that I have lived thereon since .)

The date of my birth was . The place of my birth was

PER CURIAM

HALL ET UX. *v.* BEALS, CLERK AND RECORDER OF EL PASO COUNTY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

No. 69. Argued October 17, 1969. Decided November 24, 1969.

Appellants, who moved to Colorado in June 1968, were refused permission to vote in the November 1968 presidential election because they could not meet Colorado's six-month statutory residency requirement. They brought this class action challenging the constitutionality of that restriction and seeking declaratory, mandamus and injunctive relief. The District Court upheld the statute and dismissed the complaint. After appellants appealed to this Court, the residency period for presidential elections was reduced to two months, and appellants also challenge that requirement in this Court. *Held*:

1. The amendment of the residency statute, under which appellants could have voted in the 1968 election, has mooted this case.

2. Appellants cannot represent a class (here Colorado voters disqualified by the two-month requirement) to which they never belonged.

3. The contingencies which would have to occur before appellants could be disenfranchised in Colorado in the next presidential election are too speculative to warrant this Court's passing on the substantive issues of this case. *Moore v. Ogilvie*, 394 U. S. 814, distinguished.

306 F. Supp. 418, vacated and remanded.

Richard Hall argued the cause pro se and for other appellant.

Bernard B. Baker argued the cause for appellees. With him on the brief were *Carroll L. Wolfe* and *Robert L. Russel*.

Briefs of amici curiae urging reversal were filed by *Solicitor General Griswold*, *Assistant Attorney General Leonard*, *Louis F. Claiborne*, and *Francis A. Keating, II*.

for the United States, by *William F. Reynard*, *Melvin L. Wulf* and *Eleanor Holmes Norton* for the American Civil Liberties Union et al.; by *Joseph L. Rauh, Jr.*, *John Silard*, and *Elliott C. Lichtman* for the Bipartisan Committee on Absentee Voting; and by Harvey M. Burg.

Louis J. Lefkowitz, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Brenda Soloff*, Assistant Attorney General, filed a brief for the State of New York as *amicus curiae* urging affirmance.

PER CURIAM.

The appellants moved from California to Colorado in June 1968. They sought to register to vote in the ensuing November presidential election, but were refused permission because they would not on election day have satisfied the six-month residency requirement that Colorado then imposed for eligibility to vote in such an election.[1] The appellants then commenced the present

[1] Colo. Rev. Stat. Ann. § 49-24-1 (1963) provided:

"*Eligibility of new resident to vote.*—Any citizen of the United States who shall have attained the age of twenty-one years, shall have resided in this state not less than six months next preceding the election at which he offers to vote, in the county or city and county not less than ninety days, and in the precinct not less than thirty days, and shall have been duly registered as required by the provisions of this article, shall have the right to vote as a new resident for presidential and vice presidential electors."

The appellant Richard Hall went to the office of the appellee Beile on or about August 1, 1968, to request that his wife and he be allowed to vote in the presidential election. Upon denial of his application, he wrote to the Colorado Secretary of State to ask that his wife and he be allowed to vote despite the six-month residency requirement. On September 6 the State Election Office informed the appellants they would not be permitted to vote.

Apart from the special provision relating to the eligibility of new residents to vote in a presidential election, Colorado requires that

class action against the appellees, electoral officials of El Paso County, Colorado. Their complaint challenged the six-month residency requirement as a violation of the Equal Protection, Due Process, and Privilege and Immunities Clauses of the Constitution. For relief they sought (1) a writ of mandamus compelling the appellees to register them for the upcoming presidential election; (2) an injunction restraining the enforcement and operation of the Colorado residency laws insofar as they applied to the presidential election; and (3) a direction that the appellees register the appellants and allow them to vote "on a conditional basis, so that should either party choose to appeal to the Supreme Court of the United States and such appeal should run past the time of the National Election on November 5, 1968 . . . the relief sought by [the appellants will] not become moot."

On October 30 the three-judge District Court entered judgment for the appellees and dismissed the complaint, holding that the six-month requirement was not unconstitutional. *Hall* v. *Beals*, 292 F. Supp. 610 (D. Colo.). As a result the appellants did not vote in the 1968 presidential election. They took a direct appeal to this Court pursuant to 28 U. S. C. § 1253; and we noted

probable jurisdiction, 394 U. S. 1011. Thereafter the Colorado Legislature reduced the residency requirement for a presidential election from six months to two months.

The 1968 election is history, and it is now impossible to grant the appellants the relief they sought in the District Court. Further, the appellants have now satisfied the six-month residency requirement of which they complained. But apart from these considerations, the recent amendatory action of the Colorado Legislature has surely operated to render this case moot. We review the judgment below in light of the Colorado statute as it now stands, not as it once did. *Thorpe* v. *Housing Authority*, 393 U. S. 268, 281-282; *United States* v. *Alabama*, 362 U. S. 602, 604; *Hines* v. *Davidowitz*, 312 U. S. 52, 60; *Carpenter* v. *Wabash R. Co.*, 309 U. S. 23, 26-27; *United States* v. *Schooner Peggy*, 1 Cranch 103, 110. And under the statute as currently written, the appellants could have voted in the 1968 presidential election. The case has therefore lost its character as a present live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law. *Golden* v. *Zwickler*, 394 U. S. 103, 110; *Baker* v. *Carr*, 369 U. S. 186, 204; *Miller* v. *Green*, 150 U. S. 651, 653.

The appellants object now to the two-month residence requirement as vigorously as they did to the six-month rule in effect when they brought suit. They say that such statutes in Colorado and elsewhere continue to have an adverse effect upon millions of citizens throughout the Nation. But the appellants' opposition to residency requirements in general cannot alter the fact that so far as they are concerned nothing in the Colorado legislative scheme as now written adversely affects either their present interests or their interests at the time this litigation was commenced. Nor does the result differ

because the appellants denominated their suit a class action on behalf of disenfranchised voters. The appellants "cannot represent a class of [which] they are not a part." *Bailey* v. *Patterson*, 369 U. S. 31, 32-33, that is, the class of voters disqualified in Colorado by virtue of the new two-month requirement, a class of which the appellants have never been members.

Nothing in *Moore* v. *Ogilvie*, 394 U. S. 814, is to the contrary. There we invalidated an Illinois statute requiring that independent candidates for presidential elector obtain signatures on their nominating petitions from voters distributed through the State. We noted that even though the 1968 election was over, "the burden placed on the nomination of candidates for statewide offices remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935." 394 U. S., at 816. The problem before us was "capable of repetition, yet evading review," not only because the same restriction on Moore's candidacy that had adversely affected him in 1968 could do so again in 1972, but because Illinois, far from having altered its statutory scheme for the future benefit of those situated similarly to Moore, had adhered for over 30 years to the same electoral policy, with no indication of change.

Here, by contrast, the appellants will face disenfranchisement in Colorado in 1972 only in the unlikely event that they first move out of the State and then re-establish residence there within two months of the presidential election in that year. Or they may take up residence in some other State and in 1972 face disqualification under *that* State's law. But such speculative contingencies afford no basis for our passing on the substantive issues the appellants would have us decide with respect

to the new amended law of Colorado. *Golden v. Zwickler*, *supra*.

The judgment of the District Court is vacated and the case is remanded with directions to dismiss the cause as moot.

It is so ordered.

MR. JUSTICE BRENNAN, dissenting.

I dissent from the direction to dismiss this case as moot. *Moore v. Ogilvie*, 394 U. S. 814 (1969), involved a challenge to the constitutionality of a statute which had been invoked to deny the appellants a place on the 1968 ballot. We were not persuaded in that case by the argument that the appeal should be dismissed since the 1968 election had been held and there was no possibility of granting any relief to appellants. Even though appellants did not allege they would seek a place on the ballot at future elections, we held that the constitutional question was one capable of repetition, yet evading review. *Southern Pacific Terminal Co. v. ICC*, 219 U. S. 498, 515 (1911), and therefore that mootness would not prevent our decision of its merits. In my view the present case is an even stronger one for application of that principle. At stake here is the fundamental right to vote, the right "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U. S. 533, 562 (1964); see also *Harper v. Virginia Board of Elections*, 383 U. S. 663, 670 (1966); and the constitutional challenge to the amended Colorado statute is peculiarly evasive of review. This is because ordinarily a person's standing to raise that question would not mature unless he had become a Colorado resident within two months prior to a presidential election. Barring resort to extraordinary expedients, that interval is obviously too short for the exhaustion of state administrative remedies and the completion of a lawsuit through filing in the

complaint in a federal district court, convening of a three-judge court, trial, and review by this Court.* True, today's virtual foreclosure of any opportunity for definitive judicial review may in some measure be prevented by resort to waiver of the requirement of exhaustion of administrative remedies, preferred calendar position, or even relaxation of the rules of ripeness to permit a person not yet a resident to challenge the statute on a showing of reasonable certainty that he would be moving to the State within the two-month period. But the difficulties which attend these expedients only buttress my conclusion that, if mootness did not bar decision of the constitutional question in *Moore* v. *Ogilvie*, there is even more reason to hold that mootness does not bar decision of the constitutional question presented here.

Reaching the merits, I would reverse, for the reasons stated by MR. JUSTICE MARSHALL in his dissenting opinion, which I join.

MR. JUSTICE MARSHALL, dissenting.

I agree with my Brother BRENNAN that this case is not moot. It involves one of those problems "capable of repetition, yet evading review," which call for relaxation of traditional concepts of mootness so that appellate review of important constitutional decisions not be permanently frustrated. *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969).

Indeed, one of the unfortunate consequences of a rigid view of mootness in cases such as this is that the state and lower federal courts may well be left as the courts of last resort for challenges of relatively short state residency requirements. Those courts may, as the District Court apparently did in this case, consider them

*The proceedings would probably require even more time if the plaintiff sued in state court, for review in this Court would come only after one or more levels of state appellate review.

selves bound by this Court's summary *per curiam* affirmance in *Drueding* v. *Devlin*, 380 U. S. 125 (1965), affirming 234 F. Supp. 721 (D. C. Md. 1964), which upheld a one-year residency requirement for voting in a presidential election. It seems to me clear that *Drueding* is not good law today. The difficulties of achieving review in this Court in cases of this sort, combined with this misleading precedent, lead me to indicate briefly my view of the merits of the case before us.

In *Drueding*, the District Court tested the residency requirement there challenged by the equal-protection standard applied to ordinary state regulations: that is, restrictions need bear only some rational relationship to a legitimate end. 234 F. Supp., at 724–725, citing *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961). But if it was not clear in 1965 it is clear now that once a State has determined that a decision is to be made by popular vote it may exclude persons from the franchise only upon a showing of a compelling interest, and even then only when the exclusion is the least restrictive method of achieving the desired purpose. *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 667 (1966); *Kramer* v. *Union School District*, 395 U. S. 621, 626–628 (1969). Close scrutiny is thus demanded of Colorado's requirement that in order to vote for President and Vice President, one must not only be a resident of that State but one must have been a resident for a certain time before the election—six months when this suit was brought, now, two months.

In support of this requirement, it is urged that the electoral college system as embodied in the Constitution contemplates the election of the President and Vice President, not by the Nation as such, but rather by the individual States, each acting as a community. Hence the argument goes, each State may legislate to ensure that those voting for its presidential electors are truly members of the state community.

The argument is surely correct as far as it goes, and this Court has often reaffirmed the power of the States to require their voters to be bona fide residents. *Carrington v. Rash*, 380 U. S. 89, 93-94 (1965); *Kramer v. Union School District*, *supra*, at 625. But this does not justify or explain the exclusion from the franchise of persons, not because their bona fide residency is questioned, but because they are recent rather than longtime residents.[1]

Nor is it a justification to say that the State has certain parochial interests at stake in the election of a President, and that it may require of its voters a period of residency sufficiently lengthy to impress upon them the local viewpoint. This is precisely the sort of argument which this Court, in *Carrington v. Rash*, *supra*, found insufficient to justify Texas' exclusion from voting in state elections of servicemen who had acquired Texas residency after they had entered the service. The State argued that military men newly moved to Texas might not have local interests sufficiently at heart. This Court replied:

> "But if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation.
>
> "Fencing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." 380 U. S. at 94.

Similarly here, the fact that newly arrived Coloradans may have a more national outlook than longtime residents, or even may retain a viewpoint characteristic of

[1] *Pope v. Williams*, 193 U. S. 621 (1904), upheld a one-year residency requirement for voting in state elections. The Court specifically reserved the question of durational residency requirements as applied to voting in presidential elections. *Id.*, at 633. In any case, *Pope* was decided long before application of the "compelling interest" test to restrictions on the franchise.

the region from which they have come, is a constitutionally impermissible reason for depriving them of their chance to influence the electoral vote of their new home State.

Nor does it suffice to argue that a durational residency requirement ensures that voters have had the time to gain knowledge of local issues, as distinguished from indoctrination in local attitudes. Even if it can be assumed that new residents know less about local issues than old residents, issues of this sort play so small a part in the election of the President and Vice President today that this can hardly be considered a compelling interest sufficient to justify entirely depriving millions of Americans of any opportunity to vote for their most important leaders. Cf. *Kramer* v. *Union School District*, *supra*, at 633.

The State argues that its durational residency requirement is necessary to ensure the purity of its elections. The impurities feared ("dual voting" and "colonization") all involve the same evil—voting by nonresidents, either singly or in blocks. But it is difficult to see how the durational residency requirement in any way protects against nonresident voting. The qualifications of the would-be voter in Colorado are determined when he registers to vote, which he may do until 20 days before the election. Colo. Rev. Stat. Ann. § 49–4–2 (1) (Supp. 1965). At that time, he establishes his qualifications, including durational residence, by oath. Colo. Rev. Stat. Ann. § 49–4–17 (Supp. 1965). The nonresident, seeking to vote, can as easily falsely swear that he has been a resident for a certain time, as he could falsely swear that he is presently a resident. The requirement of the additional element to be sworn—the duration of residency—adds no discernible protection against "dual voting" or "colonization" by voters willing to lie. Insofar as appears from the Colorado election laws, and from the record in

this case, the State makes no independent attempt to go behind the voter's oath to determine his qualifications. See Colo. Rev. Stat. Ann. § 49–13 (Supp. 1965).

Moreover, even if an enforcement effort were made to prevent nonresident voting, and the exclusion of those taking up residency within two months of the election were used as a method of eliminating cases on the borderline between new residents and mere visitors, such an approach would be constitutionally overbroad. In *Carrington* v. *Rash*, *supra*, the State similarly argued that it was in many instances difficult to tell whether persons moving to Texas while they were in the service had the genuine intent to remain that establishes residency. Thus, the argument went, the administrative convenience of avoiding difficult factual determinations justified a blanket exclusion of all those in the doubtful category. The Court rejected such a "conclusive presumption" approach, noting that "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." 380 U. S., at 96. Cf. *Harman* v. *Forssenius*, 380 U. S. 528, 542–543 (1965).

Similarly here, a conclusive presumption that a recently established resident is not a resident at all for voting purposes is simply an overbroad burden upon the right to vote. In most cases, it is no more difficult to determine whether one recently arrived in the community has sufficient intent to remain to qualify as a resident than it is to make a similar determination for an older inhabitant.[2] That there are borderline cases among the new

[2] For instance, the appellants in this case, before applying for their ballots, had bought a home in Colorado Springs, registered their car with the Colorado Department of Motor Vehicles, acquired Colorado drivers' licenses, and registered their eldest child in a private nursery school; further, Mr. Hall had taken permanent employment with a law firm in Colorado Springs.

arrivals is not a constitutionally sufficient reason for denying the vote to those who have settled in good faith.

Finally, the State argues that the logistics of preparing for an election require that there be some time between the close of registration and the election itself. This period serves as a kind of residency requirement, in that persons establishing residency after the voting lists are closed are barred from voting. Yet this requirement is justified by compelling administrative needs. And, it is argued, once some period of this sort is conceded to be required, it is arbitrary for the courts to determine as a matter of constitutional law how long it may be.

But this argument is unconvincing here. Colorado has apparently judged that administrative needs require 20 days between the close of registration and election day. Colo. Rev. Stat. Ann. § 49–4–2 (2) (Supp. 1965). Appellants have not challenged this statute. What they have challenged is the separate and additional requirement that voters, all of whom register before the 20-day cutoff date, also must have been residents of the State at least six months—by recent amendment two months—before the election. Colo. Rev. Stat. Ann. § 49–24–1 (1963). For the argument from logistical need to save the durational residency requirement, the State would have to show some additional administrative need for this further burden on the right to vote. No such showing has been made. In my view the Colorado durational residency requirement for voters for President and Vice President violates the Equal Protection Clause, and appellants are entitled to reversal of the District Court judgment which upheld that requirement.